

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30678
Docket No. MW-28563
95-3-88-3-377

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Grand Trunk Western Railroad Company (former
(Detroit, Toledo & Ironton Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when Truck Driver - Trackman R.R. Cochenour was not compensated for the service he performed or reimbursed for the expenses he incurred as a result of complying with the Carrier's instructions to obtain a physical examination in Detroit, Michigan on June 9, 1987 (Carrier's File 8365-233).
- (2) Mr. R.R. Cochenour shall be allowed eight (8) hours of pay at his straight time rate, four (4) hours of pay at his time and one-half overtime rate and he shall be reimbursed in accordance with Agreement rules for the mileage and meal expense he incurred on June 9, 1987."

FINDINGS:

The Third 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 suffered an injury and was on leave of absence because of the injury prior to the claim date. When he was ready to return to service, Carrier instructed Claimant to undergo a reentry physical at its Detroit Medical office. Claimant complied with Carrier's instructions and then submitted an expense voucher for mileage, meals and salary. When his expenses were declined, the instant claim was submitted. In support thereof, the Organization relies on Rules 29, 40 and 42 of the Agreement. These Rules state as follows:

"RULE 29 -- TRAVELING BY DIRECTION OF MANAGEMENT
(Effective 4-1-55)

Except as otherwise provided in these rules, employees required by Management to travel on or off their assigned territory (including travel in camp cars or trailers) will be allowed pro rata rate for all time traveling or waiting during or outside of their assigned working hours, and on rest days, and the holidays specified in Rule 23, except:

* * *

(e) Except as otherwise provided in these rules, employees required to live away from home in camp cars, camps, highway trailers, hotels or motels who are required by Management to travel on or off their assigned territory including travel in camp cars or trailers will be allowed pro rata rate for all time traveling or waiting during or outside of their assigned working hours and on rest days and the holidays specified in Rule 23.

Such employee who is not furnished means of transportation by the railroad company from one point to another and who uses other forms of transportation for this purpose shall be reimbursed for the cost of such other transportation. If he uses his personal automobile for this purpose in the absence of transportation furnished by the railroad company he shall be reimbursed for such use of his automobile at the rate of nine cents a mile. If an employee's work point is changed during his absence from the work point on a rest day or holiday this paragraph shall apply to any mileage he is required to travel to the new work point in excess of that required to return to the former work point.

(f) An employee who is required to travel by direction of Management shall be furnished with free transportation by the railroad company. If such transportation is not furnished, he will be reimbursed for the cost of rail fare if he travels on other rail lines, or the cost of public transportation used in making the trip; or if he has an automobile which he is willing to use and the carrier authorizes him to use said automobile, he will be paid allowance of nine cents for each mile.

* * *

RULE 40 -- MEALS AND LODGING

(a) An employee required to perform work on or off his assigned territory, and away from his headquarters will be reimbursed for cost of meals and lodgings by the Company. This rule will not apply to an employee customarily providing his own lunch, and not being held away from assigned territory an unreasonable time beyond the evening meal hour.

(b) When meals and lodging are furnished by the Company no time outside regularly assigned hours will be paid for (other than payments accruing under Rule 29) except when worked.

* * *

RULE 42 -- PHYSICAL EXAMINATION

The Company will bear the expense of physical examinations when required by the Company."

The Organization asserts that Carrier directed Claimant to report to Detroit and therefore under Rule 29 it was required to furnish him with free transportation. Similarly, since Claimant was held away from his assigned territory, he should have been compensated for his meals in accordance with Rule 40. In addition, the Organization argues that the term "expense" as set forth in Rule 42 should be broadly construed, particularly since Claimant could have been given a physical by Carrier's physician at Springfield, Ohio, where Claimant is assigned. To require this employee to drive over 500 miles at his own expense is simply unreasonable, the Organization urges. Moreover, Carrier has in the past paid for expenses incurred by employees required by Carrier to undergo physical examinations, and that practice should be adhered to in this case.

Carrier defends by arguing that Rules 29 and 40 are inapplicable to the case at hand because they pertain to travel in the performance of a work assignment. As for Rule 42, Carrier contends that the language therein clearly and unambiguously provides that the Company bear the expense of a physical examination. There is no mention that Carrier must also bear the expense of meals, mileage and salary as well, the Carrier points out. Carrier argues further that even if the language is deemed ambiguous, there have been numerous cases in which employees have been required to report to the Detroit office for physical examinations. In none of those cases has the Carrier reimbursed the employee for expenses incurred beyond the cost of the exam itself. That practice supports the Carrier's claimed interpretation of Rule 42, it is asserted.

A close examination of Rules 29 and 40, cited above, convinces this Board that they do not apply to the situation presented in this case. As Carrier correctly pointed out, Rule 29, entitled "Traveling by Direction of Management," is prefaced by the following language:

"Except as otherwise provided in these rules, employees required by the Management to travel on or off their assigned territory (including travel in camp cars or trailers) will be allowed pro rata rate for all time traveling or waiting during or outside of their assigned working hours, and on rest days...."

There is no evidence that the Rule contemplates payment for anything other than activity related to the assignment of an employee. In the instant case, Claimant had no assigned working hours; he was seeking a medical release to return to duty.

Similarly, Rule 40 applies to individuals performing service in connection with their assignment. Paragraph (a) provides for the payment of meals and lodging expenses where an employee is "required to perform work" on or off his assigned territory. The Organization has not shown that Claimant was required to perform work on or off his assigned territory on the date of the claim. He was taking a return-to-duty physical, and until approved for duty and assigned to perform work, he could not make a claim for payment of expenses under Rule 40.

The remaining question is whether Claimant's expenses should have been paid in accordance with Rule 42. On that issue, we do not agree with Carrier's contention that the meaning of the term "expense" is so clear on its face that there is no need to consider extrinsic evidence. The term "expense" is not defined in Rule 42 and we have not been directed to any other provision in the Agreement which would shed light on precisely what the parties meant when they inserted the word "expense" in the Agreement. At the same time, though, we must conclude that past practice has not been proven either by the Organization or the Carrier. The few statements of employees offered by the Organization of instances in which Carrier reimbursed for expenses incurred in connection with physical exams did not contain sufficient information so as to ascertain whether they involved physical for reentry to service following an injury, or just periodic exams.

By the same token, Carrier's assertions of past practice did not constitute strong proof either. Evidence of past practice in its favor must generally be unequivocal, clearly enunciated, and readily ascertainable over a long period of time as a fixed practice accepted by both parties. In this case, the record leaves considerable room for doubt as to whether there was any "mutual" acceptance by the parties or even knowledge of a "practice" on the part of the Organization.

That being the case, we note that dictionary definitions of the term "expense" typically define the word as a financial outlay or expenditure. That definition, we find, is susceptible of an interpretation broad enough to include Claimant's mileage and meal expenses. Although it was certainly within the prerogative of Management to determine where Claimant was required to take his physical, it was also Carrier's responsibility to bear the cost of those expenses incurred in connection with the physical examination. Here, Claimant was required to travel over 500 miles, round trip, over a period of 12 hours, to present himself to Carrier's physicians in Detroit. While he was not on assignment, and therefore no wages are owing, we do find that his other out-of-pocket expenses should have been reimbursed in accordance with Rule 42.

Accordingly, Claimant shall be compensated for his mileage and meal expenses incurred in connection with Carrier's directive that he obtain a physical examination in Detroit on June 9, 1987. However, that portion of the claim requesting eight hours of pay at straight time and four hours of pay at time and one-half is denied.

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AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.