Award No. 2828
Docket No. TE-2668

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad Company, that J. H. Morris and F. R. Dedrick, Towermen, Denville, New Jersey, be paid for two hours each at time and one-half time (Call) at the rate of their respective positions because the Carrier required them to use that much of their off-duty periods for physical re-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.

J. H. Morris and F. R. Dedrick are regularly assigned to towerman positions at Denville, New Jersey, listed at page 18 of the Telegraphers' Agreement, rate of pay (October, 1942) 88¢ an hour.

On October 26, 1942, Chief Dispatcher H. E. Cruser instructed Mr. Morris, by letter, to report to Dr. Baker, located in Dover, New Jersey, for physical examination on or before November 1, 1942, and on the same date Mr. Dedrick received similar instructions to report to the same doctor for physical examination, on or before November 18, 1942. Those instructions were complied with except to save time and expense both employes requested and were granted permission to submit to Dr. Bird at Netcong for said physical examination.

The towermen at Denville are required to manipulate highway crossing gates in addition to duties ordinarily required of towermen and/or levermen.

Bulletins issued from time to time advertising vacancies at Denville Tower do not record that such physical examinations are required because crossing gates are to be manipulated.

J. H. Morris' assigned hours at Denville Tower were 12:00 midnight to 8:00 A. M. He took physical examination November 9, 1942, at a cost of two hours of his time, viz., 6:00 P. M. to 8:00 P. M. F. R. Dedrick's assigned hours were 4:00 P. M. to 12:00 midnight. He took physical examination November 14, 1942, at a cost of two hours of his time, viz., 1:00 P. M. to 3:00 P. M. In behalf of these two employes, the organization filed claim for payment therefor, under the provisions of Rule 5 (Call Rule) of the Telegraphers' Agreement. The claim was denied.

Towermen other than those who operate crossing gates are not required to take these physical examinations.

Rule 5—Call Rule—reads:

"Employes notified or called to perform **work** not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

Where an agreement contemplates that employes will be paid for attending a physical examination, the agreement must so provide.

Award 8193—First Division

The Board has no power to create such a rule where the agreement does not contain it.

"The Board has no authority to read into a contract that which its makers have not put there expressly or by clear implication."

Award 217—Fourth Division

"* * * A new contract will not be written or given effect by this division under the guise of an interpretation of the old."

Award 7498—First Division

" 'A call' means a direction to report for **actual work.**"

Award 9002—First Division

In Third Division Award, No. 605, Docket TE-593, claim for pay account taking a physical examination, Referee F. M. Swacker, the opinion of the Board is:

"Opinion of the Board: As stated by the Referee in Award 134, were this a new question the disposition of the Board would be to hold that services of the nature involved in this case are such as would fairly come within the contemplation of the word 'work' as used in the rules—however, the weight of authority is to the effect that it is not 'work' as so used and numerous agreements have been re-written since many of these decisions were rendered without making any change to cover situations of this sort. See Award 588. Consequently the Board is indisposed to over-rule this line of authorities."

On the Carrier's property there are 330 crossing flagmen and gatemen, tunnel watchmen, etc., subject to the physical examination Schedule, in addition to 15 joint towermen-gatemen, and no previous protest or claim for payment has been made by any of these employes since the present program was inaugurated in 1935.

The Carrier, therefore, contends that the claim is without merit and should be denied because:

First: There is no rule, practice or precedent for such a claim.

Second: No time was lost, nor expense incurred, nor were they deprived of proper rest.

Third: The physical examination was in the interest of the employe himself and solely for the purpose of determining his physical fitness to be retained on his position and to take corrective measures should a condition arise making such action necessary.

OPINION OF BOARD: Messrs. Morris and Dedrick were Towermen at Denville, New Jersey, working from 12:00 midnight to 8:00 A. M., and 4:00 P. M. to midnight, respectively. In addition to their Towermen's duties they operated gates protecting a highway crossing over the railroad's tracks adjacent to the Tower.

In line with practices in effect since June, 1935, that employes protecting highway crossings shall be given a physical examination each two years up to age 60, and yearly thereafter, instructions were issued on October 26, 1942, for Morris to report to Dr. Baker at Dover, New Jersey, on or before November 1, 1942, and for Dedrick to report to Dr. Baker on or before November 18, 1942, for physical examination. At their own request they were permitted to report to Dr. Bird at Netcong, New Jersey, instead of Dr. Baker at Dover. The Carrier states without refutation that the Official Guide shows the distance from Denville to Dover at 4.2 miles and the distance from Denville to Netcong as 14.1 miles. Morris, who completed his tour of duty at 8:00 A. M., and was due to report for work at midnight, left his home in his auto about 6:00 P. M. and returned from the doctor's office to his home about 8:00 P. M. Dedrick, who completed his tour of duty at midnight and was due to report for work at 4:00 P. M. left his home about 1:00 P. M. and returned from the doctor's office to his home about 3:00 P. M.

The claim is for two hours' pay at time and one-half for each employe because the Carrier required them to use that much of their off duty periods for physical re-examination.

Provisions of the current Agreement relied on as substantiating the claim will be quoted:

Rule 5, which reads:

> "Employes notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

Rule 4, which provides:

> "Except as otherwise provided, time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate."

Rule 13 (a), which states:

> "Employes temporarily engaged in business of the Company outside the line of their regular duties, at court or otherwise, will be paid their regular wages and necessary expenses while so engaged, court fees and mileage to be assigned to the Company."

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.

The question of whether an employe is entitled to pay under circumstances here involved seems to be one of first impression in this Division. No precedent has been cited having to do with the question and the Referee has found none.

Awards, both pro and con, have been submitted dealing with the right to compensation where the employe has been required, on order of the employer, to attend an investigation. No useful purpose would be served in discussing the effect of those decisions which it is conceded are not in harmony. The subject was thoroughly discussed in Award 2223, where a number of awards dealing with the various phases of the subject are listed. It should perhaps be stated in passing that we see little analogy in principle between such situations where it must be admitted the employes were serving the interests of

the master and the instant one where there is a mutual interest involved and in addition the matter of protection to the public which should be a matter of concern to both employer and employe alike.

More room for comparison can be found where claims have been made for compensation for time spent in attending Rules and Safety Meetings but in those situations by the great weight of authority compensation has been denied. See Awards Nos. 487, 773 and 2508.

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.

Confining our conclusion to the instant situation and so far as it involves the right to recover overtime pay for off duty time spent in taking a physical examination we believe the true rule is that such right must be found from express language appearing within the four corners of the Contract itself, or from language appearing therein from which an inference to that effect is reasonably to be drawn, or it does not exist. Measured by this yardstick we are unable to perceive anything in the three rules relied on which would permit the sustaining of the Petitioner's claim. We see nothing, either express or inferential, in Rule 4 to justify a conclusion that the phrase, "time worked" can be extended to embrace the taking of a physical examination, neither do we find anything in the term, "to perform work not continuous with the regular work period," as it appears in Rule 5, which permits that result, nor are we able to say that the words, "temporarily engaged in business of the Company outside the line of their regular duties," as used in Rule 13 (a), can be given that construction. It follows the claim must be denied.

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; and

That the rules relied on do not sustain Petitioner's contention that they require payment of compensation for off duty time spent in the taking of physical examinations.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1945.