Award No. 3302
Docket No. SG-3308

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim that Signal Maintainer Jack Riddle be paid three (3) hours at the time and one-half time rate for services performed on Washington's Birthday (a legal holiday), February 22, 1945, account being notified by the Division Superintendent to await arrival of Medical Examiner and for taking routine physical examination. Amount of claim $4.68.

EMPLOYES' STATEMENT OF FACTS: Signal Maintainer Riddle was assigned by bulletin to the Gila Section. This section consists of 23.1 miles of automatic block signals extending from Signal 8336 to Signal 8567. His headquarters are located at Gila, Arizona and his assigned working hours were established by agreement. They are 8:00 a.m. to 12:00 noon, and 1:00 p.m. to 5:00 p.m.. eight hours per day, six days per week, except weeks in which holidays occur as provided for in Rule 5 (b). The holidays are specified in Rule 9.

Riddle was notified by a telegram that was filed at 3:25 p.m., February 21, 1945, to report at 12:30 p.m., February 22, 1945 for medical re-examination by Doctor Talbot, a Medical Examiner with headquarters San Francisco, who was making a trip over the division by automobile, which was to be held sometime between 12:30 p.m. and the doctor's departure for Phoenix. Signal Maintainer Riddle held himself in readiness to take this routine physical re-examination from 12:30 p.m. until about 2:30 p.m., when the doctor actually arrived at Gila. The re-examination of Riddle was concluded about 3:30 p.m.

The Southern Pacific Hospital Department, to which the Southern Pacific employes contribute through pay roll deduction, has a company doctor at Gila and pays such doctor $150.00 per month to care for the employes in that area. On February 22, 1945 the company doctor at Gila was Doctor Axline, who could have given this routine physical re-examination to Riddle during his regular working hours and at no inconvenience to Signal Maintainer Riddle.

There is an agreement between the parties to this dispute effective March 1, 1926.

POSITION OF EMPLOYES: The Brotherhood contends that Signal Maintainer Riddle should have been paid three hours at time and one-half rate for time consumed in waiting for the doctor and taking the routine physical re-examination, which was required by the Carrier to be taken on a legal holiday on instructions from the Division Superintendent.

in Award 2828 of this Division. In considering said issue in that award, the Division speaking through Referee J. S. Parker, considered all previous awards that presented similar or analagous issues and arrived at the conclusion that:

> "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."

Applying this principle to the instant case, the Division would have to determine from the language contained in the current agreement, that such language specifically provided, or at least by inference provided, for payment from time consumed under the circumstances involved in this case. The carrier asserts that nothing contained in Rule 13 or 14, or any other provision of the current agreement, specifically or by inference, provides for or contemplates payment under the circumstances involved in this case. To read into said rules provisions requiring such payment would in fact be reading in language that does not appear therein.

The Division will note that one of the rules relied upon by the petitioning organization in Award 2828 was a "call rule" similar to Rule 13 of the current agreement; in addition to said "call rule" the petitioning organization likewise relied upon two other rules of the collective agreement involved. In considering those rules, and applying the principle above-quoted, the opinion states:

> "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."

With regard to the "call rule" (Rule 4) relied upon by the petitioning organization in Award 2828, it was stated:

> "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,' . . . which permits that result, ..."

In other words, in Award 2828 the Division concluded that time consumed in submitting to a physical re-examination was not time worked as that term was used in the rules relied upon; therefore, the Division must necessarily conclude that when the claimant in the instant case was notified to submit to a physical re-examination on February 22, 1945, he was not being notified or called "to perform work". It must therefore follow that Rule 13, and likewise Rule 14 of the current agreement, are not in any manner applicable to the instant case and will not support the payment claimed.

During the handling of this case with carrier's representatives the petitioner's representatives also cited and relied upon Awards 76, 2032 and 2223 of this Division as supporting the claim. The Division will note that the issues involved in said awards are not the same as that existing in this docket; furthermore, those awards antedate Award 2828 and were undoubtedly considered by the Division when it rendered Award 2828. The carrier submits that Award 2828 is conclusive as to the issue involved in this docket and, therefore, the claim must be denied.

CONCLUSION

The carrier submits that it has conclusively established that the claim in this docket is without basis and therefore, respectfully asserts that it is incumbent upon the Division to deny said claim.

OPINION OF BOARD: The Claimant here had assigned working hours from 8:00 a.m. to 12 Noon and 1:00 p.m. to 5:00 p.m., six days per week, ex-

cept certain specified holidays. February 22, 1945 was such a holiday. Prior thereto the Claimant was ordered to appear at 12:30 p.m. on February 22nd for physical examination. The examination consumed 3 hours for which Claimant asks pay at time and one-half rate.

There is no rule specifically providing whether or not pay shall be had for time used taking physical examinations. It was argued in behalf of the Carrier, that ordinarily the Carrier releases employes from their duties to undergo physical examinations when examiners are present and ready at a time employes are on duty. But here the examiner was not so present when the employe was on duty.

The question then is where an employe is required to present himself for physical examination at hours or days when he is not on duty, is he entitled to compensation and if so, at what rate?

The employe relies upon Rule 9 which provides that:

> "Work performed on Sundays and the following legal holidays . . . (including Washington's Birthday) . . . shall be paid for at the rate of time and one-half. . . ."

and upon Rule 13 providing:

> "Employes released from duty and notified or called to perform work outside of and not continuous with regular working hours, will be paid a minimum allowance of two (2) hours at time and one-half rate; if held longer than two (2) hours, they will be paid at the time and one-half rate computed on actual minute basis."

To bring this claim within these rules we must hold that reporting and undergoing a physical examination is "work". This Division as early as Award 134 held that the term "work" as used in collective agreements in the railroad industry, has usually been construed to mean work of the type to which an employe is regularly assigned. Clearly under that definition, taking a physical examination is not work within the cited rules.

But it is contended that subsequent awards have not followed the above definition as all-inclusive and have not been consistent on the question there decided. The Referee has examined the awards referred to him, by the Carrier and Labor Members, and has assumed that their investigation has disclosed the relevant awards. When classified as to the factual basis of the claims the "inconsistency" in these awards disappears, except as to one class which we will discuss first.

But before discussing the awards it should be pointed out that there can be no question but that the carrier and the employe have a mutual interest in physical examinations. Both desire to know and must know whether or not the employe is physically fit to perform his duties and likewise what steps must be taken, if any, to assure a continuance of physical fitness.

There are a group of awards relied upon by the employes involving investigations where the employe required to attend had no direct concern in the matter being investigated but attended as a witness. In short where there was no mutuality of interest. The benefit was to the carrier in fact development. The employes rely upon statements made in the opinions in four awards falling into this classification. See Awards 588, 1545, 2032 and 2223. These awards would be in point here were it not for the material distinction, i.e.—they did not involve mutuality of interest. This distinction is recognized in Awards 588, 1545 and 2223. In Award 588 it was held that the decision was not controlled by cases holding pay schedules inapplicable to one attending investigation, but by a different rule there set out. Award 1545 was based upon statements found in Award 588, and the claim was sustained because the employe attended "concerning a matter with which he had no connection". In Award 2032 a claim, based on attending as a witness in a matter where the claimant was not involved, was sustained relying on Awards 588 and 1545. In Award 2223 the claimant appeared as a witness. It was found that there

was no mutuality of interest but that the employe appeared solely in the interest of the carrier. The claim was sustained on that basis. Language used in the opinions in the awards upon which the employes rely must be weighed in the scales of the distinction made in the awards. That distinction exists in the instant claim and removes the above awards as either persuasive or controlling precedents.

There are awards, relied on by the Carrier, in investigation cases, where the employe required to attend was not under investigation and where claims were denied. Award 134 was an investigation case where claimant appeared as a witness. It is not stated in the award but apparently the services of the claimant were not under investigation. The claim was denied. In Award 409 the employes claimed payment under a "work" rule for attending an investigation of an accident where the crew was found not to blame. The contention that it was work under the rule was denied. In Award 1816 the employe attended as a witness. The claim that he was compensable under a "work" rule was denied. In Award 2132 there was a direct denial of the claim on the ground that attendance at an investigation was not work as used in the rule (Awards 588 and 1545 being discussed in the submission). In Awards 2512 and 2778 the employe attended an investigation. The decisions were based on a "court business and investigations" rule and the claims were denied. Award 3220, dated May 29, 1946, was an investigation case involving a rule similar to Rule 13 in the instant claim. The claim was denied. Award 1032 was a claim for travel and waiting time in connection with an investigation of an accident, where the services of the employe claiming payment were under investigation and where the charge was sustained. The carrier admitted that it had paid claims of witnesses attending investigations of matters in which they were not involved. The mutuality of interest element was present. This Division without a referee denied the claim.

We now go to a second group of awards which deal with claims for attendance on off duty hours for examination on rules. Here there is a mutuality of interest in that both the carrier and the employe are concerned that the employe be qualified mentally on the rules so as to be fit to perform his duties. In this group of cited awards there is no real conflict. The first of these awards is No. 76. The employe relies upon certain language in this award. The claim was sustained for reasons peculiar to the claim. However, the Division there said:

> "Had the record in this case disclosed that due to peculiar circumstances over which the Carrier had no control, that it was impracticable for the carrier to conduct the examination at any other time, this division is of the opinion that the employes should have cooperated and given their time without complaint or the expectancy of remuneration, for the reason that the examination was for the mutual benefit of the employe and employes."

In Award 487 it was held:

> "There is no doubt but that some inconvenience and sacrifice of time was occasioned the claimants by the requirements of the carrier and examination of the employers (sic) to determine their familiarity with the Book of Rules and Regulations of the Operating Department; at the same time such examination was as much to the advantage of the employes as to the carrier, inasmuch as it constituted a means of certifying or re-certifying the employes to the requirements of the positions of responsibility they held with the carrier."

The claim was denied. In Award 733 it was held "attending rules examinations, is not 'work' as that term is used in the schedule provisions providing pay for work performed outside assigned hours". In Award 2508 a conference of employes was held which the employes said was a conference to discuss rules. The issue was whether the employes were entitled to pay at the time and a half rate under rules such as are presented here. The claim was denied.

It is our view that these examinations on rules awards are pertinent and in point because of the mutuality of interest element and the similarity of the rules involved.

We now turn to a third group of awards where the employe was required to attend for physical examination during his off duty time. In Award 605, relying upon Award 588, such a claim was denied. In Award 1427 (not cited by the Carrier but referred to in Award 2223) the claim was denied with the statement:

> ". . . employes in qualifying themselves for positions and keeping themselves qualified, and to achieve promotion, are serving themselves primarily. Only in a secondary sense are they serving the carriers."

In Award 2828 the employes relied upon Awards 2032 and 2223 as they do here. There mutuality of interest was recognized as a distinctive element. In denying the claim it was said:

> ". . . 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.

The claim was denied.

Conflicting awards in physical examination cases have not been cited to the Referee.

Consistent with the awards in claims involving attendance for rules examinations and physical examinations the claim here is 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 for reasons given in the Opinion the claim is denied.

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 October, 1946.