

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, 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 Delaware, Lackawanna and Western Railroad Company that R. C. Zeek, regularly assigned Towerman, Denville, New Jersey, assigned hours 8:00 A. M. to 4:00 P. M. shall be paid what he would have earned on his position April 17 through April 24, 1947, when and because the Carrier required him to vacate said position on these days and submit to a physical check-up at the Moses Taylor Hospital (Company Hospital), Scranton, Pennsylvania.

EMPLOYES' STATEMENT OF FACTS: An Agreement, hereinafter referred to as the Telegraphers' Agreement, bearing effective dates of May 1, 1940, and May 22, 1946, as to rules and rates of pay, respectively, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

R. C. Zeek, regularly assigned to the first trick (8:00 A. M. to 4:00 P. M.) towerman position at Denville, New Jersey, was instructed to and did report to Carrier's Dr. Stewart, Hoboken, New Jersey, March 17, 1947, for physical examination. Mr. Zeek was not informed of the result of said examination, and continued his daily working schedule.

By telephone April 7, 1947, Chief Train Dispatcher instructed Mr. Zeek to vacate his position as soon as relief could be made available and report to Moses Taylor Hospital (Company Hospital), Scranton, Pennsylvania, for another physical examination. Relief was afforded Mr. Zeek beginning April 17 through April 24, 1947. Mr. Zeek did not request an examination, treatment or hospitalization, hence claim was made for any and all wages lost April 17 through April 24, 1947. The Carrier denied the claim.

POSITION OF EMPLOYEES: Mr. Zeek's version of the treatment accorded him in this case is:

"My last physical was taken at Hoboken by Dr. Stewart at his office on March 17, 1947.

On or about April 7 Mr. Cruser called me on phone and told me I had to go to Moses Taylor Hospital for a check-up. I called Mr. Cruser on telephone about April 13 and told him I would be ready to go on April 17 and to send me slips so I could ride Nos. 3 and 6. On April 15 I again phoned Mr. Cruser and told him I had not received the slips for No. 3 yet. Mr. Cruser informed me I would get them in time to make the trip.

portation facilities makes it responsible for the fitness of its employees to hold their respective positions. While this liability does not give a carrier a license to hold out of service at will, where it acts in good faith and upon facts that justify such action, it is clearly within its rights under the prevailing agreement. (Emphasis supplied.)

* * * It seems to us that where the question of safety to the public is involved, the Carrier is entitled to hold an employee out of service on advice of its Chief Medical Officer, or other qualified physician, that he considers the employee unsafe for service. * * *

* * * Under these circumstances it cannot be said that the time involved was unreasonable insofar as this employee is concerned.
* * *

The Board is respectfully referred to that part of Opinion of the Board in Third Division Award No. 2828, Order of Railroad Telegraphers v. The Delaware, Lackawanna & Western Railroad Company, Referee Jay S. Parker, involving claim for pay for two towermen at Denville account taking physical examination, reading as follows:

"Awards, both pro and con, have been submitted dealing with the right to compensation where the employee 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 employees 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 employee alike." (Emphasis supplied.)

The employees in the case of R. C. Zeek are again asking for pay for time consumed in taking physical examinations and treatment, but this time using other rules of the Agreement despite the fact that their claim in Award 2828 on this property was denied by the Third Division.

The Carrier acted within the ambit of its responsibility to the public and its employees in sending Mr. Zeek to the Company hospital for free treatment which after 7 days resulted in the employee's ability to resume work; certainly this is not an unreasonable time; also the Carrier was careful to avoid any violation of the agreement rules in looking after the physical welfare of Employee R. C. Zeek.

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: Award 2860 of this Board concerned a claim for compensation for time lost from work while taking a physical examination. That award involved the very same Organization and Carrier that are involved here; also, that award involved the same Rules, Rule 11 and Rule 23, that are under consideration here. In that award this Board allowed the claim, saying:

"This is not a case of an employee 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, employees will not be required to suspend work during regular hours, and under Rule 23, regularly assigned employees will receive one day's pay within each twenty-four (24) hours. It seems to us that under these rules employee is entitled to pay for necessary time lost while taking a physical examination. The request for the examination was made by the Carrier. If employee 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."

But in the instant case the Carrier contends that the employe should not be paid for the time lost because he was sent to the hospital for treatment rather than for a physical examination. Claimant testified that he was ordered to the hospital for a check-up; his testimony, in part, is as follows: "I had all kinds of physical tests made while I was there, but no treatments except one injection of something in my shoulder." While the Carrier contends that the employe was sent to the hospital for treatment, it has not been entirely consistent in that contention. This fact is evidenced by a letter sent from the Carrier to Petitioners on August 8, 1947, in which letter the Carrier spoke of a physical check up, as follows:

"I want it clearly understood that this Company would not send a single employe to Moses Taylor Hospital for a physical check up and necessary observation unless there was some good reason for doing so. The medical history in the case of R. C. Zeek definitely showed the necessity of this check up, * * *."

It is to be noted that Claimant had been examined on March 17, 1947, and that he was not ordered back to the hospital until April 17, 1947. If treatment was required after the March 17 examination it hardly seems reasonable that a full month would have been allowed to elapse before the employe should be ordered to the hospital for that treatment, and especially so considering the density of the train service controlled by the tower where this employe was on duty. It is much more reasonable to conclude that the employe was sent to the hospital on April 17, 1947, for a re-examination, and that this Board does do.

The record shows that Claimant returned from the hospital in sufficient time to report for work on April 24; also, that he had been given "a slip from Mr. Diegtel" permitting him to return to work. Claim is denied for April 24. Since Claimant would not have worked on his rest day, April 19, the claim for that day is denied also.

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 11 and Rule 23 of the Agreement between the parties.

AWARD

Claim sustained except for April 19 and April 24.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of February, 1949.