

Award No. 13852

Docket No. MW-14015

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement and established interpretations thereof when it failed and refused to compensate Crossing Watchmen C. A. Delcoure and C. C. Emery for the time each consumed outside of their regularly assigned hours in submitting to a physical examination as directed by Management.

(2) Crossing Watchman C. A. Delcoure be allowed pay at his time and one-half rate for the three (3) hours and forty-five (45) minutes he consumed in submitting to the aforesaid physical examination on Thursday, November 30, 1961.

(3) Crossing Watchman C. C. Emery be allowed pay at his time and one-half rate for the two (2) hours he consumed in submitting to the aforesaid physical examination on Monday, December 4, 1961.

EMPLOYEES' STATEMENT OF FACTS: Mr. C. C. Emery was regularly assigned on Job No. 92, Crossing Watchman, at Branch Street, St. Louis, Missouri, with a work week extending Thursday through Monday; Tuesday and Wednesday being rest days. His assigned hours were from 11:00 P.M. to 7:00 A.M. Under date of November 24, 1961, he was instructed by Division Engineer Bane to report to Dr. V. O. Fish, St. Louis, Missouri, for a physical re-examination. In accordance with instructions, Mr. Emery reported to Dr. Fish on Monday, December 4, 1961, and underwent said re-examination. In doing so, he expended two (2) hours outside of his assigned hours, for which the Carrier refused to compensate him.

Mr. C. A. Delcoure was regularly assigned on Job No. 86, Crossing Watchman, at Destrehan Street, St. Louis, Missouri, with a work week extending Saturday through Wednesday; Thursday and Friday being rest days. His assigned hours were from 6:00 A.M. to 2:00 P.M. Under date

employees arise by reason thereof, this Division is without authority to correct them as it has not been given equity powers. In other words, we cannot make a rule or modify existing rules to prevent inequities thus created. Renegotiation thereof is the manner provided by the Railway Labor Act, which is the proper source of authority for that purpose. See Award 5703. See, also, Awards 4439, 5864, 2491."

In its Award No. 5500 this Division also held:

"The Organization urges that such was not the intention of the parties in making the agreement, and that such result would be unfair. It is a cardinal rule of contract construction that, in the absence of ambiguity, the intention of the parties is ascertained from the language they used to express their agreement. This rule is plain and unambiguous, and this Board is without authority to decide cases upon the basis of equity or fairness when the matter is governed by the clear terms of an agreement between the parties."

In conclusion, under the agreement between the parties to this dispute, the Carrier is not required to pay Messrs. Delcours and Emery for undergoing triennial physical re-examinations and, therefore, the claimants are not entitled to the compensation claimed.

The claims should be dismissed, and if not dismissed, denied.

(Exhibits not reproduced.)

OPINION OF BOARD: A dispute as to fact exists only with regard to whether, in the case of Claimant Delcours, he was specifically instructed to report for his physical examination outside the hours of his regular assignment. It is not necessary to resolve this dispute since we assume that, in notifying each Claimant to report to a company doctor for his regular triennial physical examination without arranging to relieve him during his regularly assigned hours, Carrier was requiring that he report for the examination in hours outside his regular assignment. The basic issue in this case is whether Carrier has the right to require this special service outside the employee's regular hours without being required to compensate the employee for the time spent in performing the special service. This issue, in turn, requires that we determine whether this particular special service was intended to be covered by the terms "work" and "worked" as used in overtime Rules 26(b)(1) and 30 respectively of the Agreement.

Since the question of whether and when the performance of services other than the usual or accustomed duties of an employee are to be compensated by Carriers has been the subject of repeated disputes between Carriers and Unions with varying decisions about different special services, it cannot simply be assumed that the special service here involved was intended to be considered work, as that term is used in the Rules. The initial burden of proving the intention of the parties is the Employees'.

In support of their claim the Employees refer to Award 3766 between the same parties. In that Award we found that the service performed by the Claimant in submitting to a physical examination at the direction of the Carrier was of service to the Carrier and for its benefit; however, the chief issue there was whether the Carrier was required to pay for the resulting time lost by Claimant from his regularly assigned hours of work. That is not

the issue here. No other valid evidence was presented to support Employees in construing the terms "work" and "worked" in Rules 26(b)(1) and 30 to cover the taking of triennial physical examinations at the direction of the Carrier. We will, therefore, deny the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1965.