Award No. 15414
Docket No. CL-16114

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5929) that:

1. Carrier violated the Clerks' Agreement when it arbitrarily deducted $81.92 from the February, 1965 earnings of E. J. Mentil, Yard Clerk, Oak Point, New York, which represented compensation paid for August 31, September 3, September 15 and October 14, 1964, previously allowed in the current pay periods.

2. Carrier shall now be required to reimburse E. J. Mentil in the amount of $81.92, deducted from his February, 1965 earnings.

EMPLOYES' STATEMENT OF FACTS: There is in full force an agreement effective September 15, 1957, as amended, entered into by and between The New York, New Haven and Hartford Railroad, hereinafter referred to as Carrier or Company, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. The Agreement is, by reference, included in this Submission as though copied herein word for word.

The dispute was handled on the property within time limitations to the highest officer designated by Carrier to handle such claims. The dispute not having been settled with the Carrier is submitted to the Third Division — National Railroad Adjustment Board for decision.

Claimant E. J. Mentil is the assigned incumbent of Yard Clerk Position No. 046, Monday through Friday, hours 8 A. M., to 5 P. M., one hour for lunch, rest days Saturday and Sunday.

August 31, September 3, September 15 and October 14, 1964, Claimant Mentil was instructed by the Agent, Mr. J. E. Carron, Harlem River, New York to report for physical examination at New Haven, Connecticut. Claimant Mentil complied with these instructions and was examined by the designated Carrier's physicians for the purpose of continued employment with the Carrier.

"Dr. Cohen found Mr. Mentil to be suffering from a mild psychosis. Dr. Cohen does not feel that Mr. Mentil needs to be hospitalized at this time. It is my recommendation that Mr. Mentil be observed, and if his behavior is peculiar he should be given a leave of absence in order to receive treatment."

On August 31, 1964, Mr. Mentil was sent to the office of the Company physician, Dr. Stanley Roth, at New Haven, account of having been observed as acting peculiarly — being antagonistic with fellow employes, talking to himself and other erratic actions while performing his duties in the Oak Point Yard area.

Dr. Roth made arrangements with Dr. Silberstein of New Haven for a psychiatric examination on September 3, 1964. Copy of report, dated October 19, 1964, from Dr. Silberstein, is attached hereto as Carrier's Exhibit B.

Prior to the receipt of written report from Dr. Silberstein, Dr. Roth reexamined Mr. Mentil on September 15 and found him OK to resume duty and to return for reexamination in one month. Mr. Mentil was again examined by Dr. Roth on October 14, 1964 and was permitted to resume duty and to return for reexamination in three months. Since that time Mr. Mentil was reexamined by Dr. Roth on January 14, 1965 and August 16, 1965. On both of these latter dates he was permitted to return to work, but to report back for reexamination in six months. However, he reported off account illness on January 26, 1966, and has not returned as of the date of this writing.

On the dates on which Mr. Mentil was sent to New Haven for these examinations he was erroneously paid his regular wages, although his position had to be covered by another employe.

Subsequently, the Auditing Department, when reviewing the payrolls, discovered these erroneous payments and deducted the four days' pay in four payments of $20.48 beginning with the week of February 6, 1965.

Claim was instituted for reimbursement to Mr. Mentil of the four days' pay deducted, and was progressed through the regular channels up to and including the undersigned.

Copy of decision of July 8, 1965, by the undersigned to General Chairman Farquharson, is attached hereto as Carrier's Exhibit C.

Agreement dated September 15, 1957, between this Company and the Brotherhood of Railway Clerks, is on file with this Board and is, by reference, made a part of this Submission.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant on the dates in question, was instructed to report for physical examination at New Haven, Connecticut, during the regular hours of his assignment and received compensation for those days.

On February 4, 1965, the Carrier advised Claimant that the compensation received for those days, would be deducted from his pay. This is precisely the issue presented, Petitioner having claimed this to be violative of the following part of Rule 9 of the Agreement:

"If a question arises as to the physical condition of an employe at any time, he may be examined by a physician designated by the Company at its expense."

It is the contention of the Carrier that the only expense referred to in the rule is the cost of the Physician's fees for the examinations.

The Petitioner's position, succinctly stated, is that the Claimant, along with others had on past occasions been compensated by the Carrier under identical factual situations.

The term "expense" is not defined in any part of the Agreement. Absent a comprehensive definition of precisely what the parties to the agreement meant, when they inserted the word "expense" in the contract, we must look to the existing practices on the property. The evidence presented by the Petitioner, convinces us that the practice had been to include wages lost in the term expense. This practice existed prior to the present collective bargaining agreement, and it is axiomatic that "when a Contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the Contract itself." (See Award 5747.) The term "expense" taken by itself, without definition, is susceptible of a very broad interpretation. The prior acts of the parties, illustrating their mutual interpretation of that term, are binding upon us, and we accordingly sustain the Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1967.

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