Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39737
Docket No. MW-38580
09-3-NRAB-00003-040608
(04-3-608)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier failed and refused to compensate Mr. J. Berry for time and travel costs in connection with a required medical examination on March 10, 2003 and when it failed and refused to compensate Mr. R. Mead for time and travel costs in connection with a required medical examination on March 13, 2003 (System File MRL-185).

2) As a consequence of the violations referred to in Part (1) above, Claimant J. Berry shall now be compensated for three (3) hours at the applicable time and one-half rate of pay and ninety (90) miles at thirty-six cents (.36¢) per mile and Claimant R. Mead shall now be compensated for five (5) hours at the applicable time and one-half rate and two hundred twenty (220) miles at thirty-six cents (.36¢) per mile."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement when it failed to compensate them for time and travel costs associated with required medical examinations.

The Organization initially contends that there is no dispute that the Claimants were required to undergo return-from-furlough physical examinations, as contemplated by Article 14 of the Agreement. The Organization asserts that there should be no doubt that the Carrier is bound by Article 14 to compensate the Claimants for all time and expenses associated with these examinations. The Organization argues that the Note to Article 14, Paragraph A is clear, and it is not subject to misinterpretation in providing that the Carrier will pay the costs associated with all required medical and Rule examinations. The Organization points out that Article 14 further provides that when such an examination takes place outside an employee's regularly scheduled work hours, then the employee will be compensated at the time and one-half rate for the actual time required to take the examination.

The Organization emphasizes that the Board consistently has held that agreements must be applied as written. The Organization maintains that there is nothing in Article 14 that requires an employee to take a medical examination prior to reporting for duty upon return from furlough or to provide him or herself with transportation to the facility where the medical examination is to be given. The Organization points out that if the Carrier wished to avoid the additional expense associated with administering such medical examinations outside of an employee's regularly scheduled hours, or compensating an employee for the use of his or her own vehicle, then the Carrier simply could provide the employee with

transportation to and from the examining facility upon the employee's return to duty.

The Organization asserts that in this case, the Carrier required the Claimants to use their own vehicles for transportation to receive a required medical examination and to do so outside of their regularly scheduled hours. The Organization insists that the Carrier is bound by the Note to Article 14, Paragraph A to provide compensation for mileage and to compensate the Claimants for all time required to take the examination. The Organization contends that there is no dispute about the amount of time and mileage that each Claimant was required to expend in connection with the medical examinations, so there should be no doubt that the instant claim should be sustained in full and that the Claimants are entitled to the full remedy requested.

The Organization then argues that it borders on the ridiculous for the Carrier to assert that an employee desiring to return to work from furlough, and who is required to undergo a medical examination in order to return to work, is voluntarily taking such an exam because the employee has chosen to return to work. The Organization emphasizes that Article 14 makes no distinction between furloughed employees who bid on positions and those ordered to return. The Organization maintains that the absence of such language demonstrates that Article 14 was intended to apply to all furloughed employees. The Organization further asserts that even if ambiguity may be imputed to Article 14, the Organization's interpretation should be adopted because it leads to just and reasonable results, while the Carrier's does not. The Organization insists that it was not the parties' intent, when crafting Article 14, to require employees to bear the expense of Carrier-required medical exams, as the Carrier implies here.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization failed to meet its burden of proof in this matter. The Carrier asserts that the Organization has put forth a twisted and illogical rationale to support its contention that Article 14 has been violated. The Carrier argues that the instant claim must be denied because neither

the Agreement nor the parties' past practice supports the Organization's contention.

The Carrier emphasizes that the language of Article 14 does not support the Organization's position because, by its express terms, it applies only to regularly assigned employees. The Carrier argues that this language actually supports the Carrier's position that the Claimants are not entitled to any expense payments pursuant to the parties' Agreement. Moreover, even if this language can be found to be ambiguous, the Organization failed to present any evidence of a past practice to support its position. The Carrier points out that in the absence of an express contract provision and/or a past practice to support its claim, the Organization failed to meet its burden of proof.

The Carrier asserts that there is no dispute that the Claimants voluntarily exercised their seniority to return to serve to cover seasonal vacancies, and that the Claimants each were given a drug screen and a medical examination, as the Carrier may require under Article 14. The Carrier asserts that the language of the Note to Article 14 clearly applies only to employees who have regularly scheduled hours. The Carrier argues that because the Claimants were on furlough and had not yet returned to service at the time that the instant claim arose, they had no regularly scheduled hours at the time of the medical examinations. Accordingly, the Carrier points out that this payment provision does not apply to them.

The Carrier contends that during their recent negotiations, the parties did not discuss the issue of whether employees returning from furlough would be entitled to the provisions of the Note to Article 14. The Carrier insists that the parties also did not expand the coverage of Article 14. The Carrier asserts that employees returning from furlough never before have been entitled to the expense provisions in the Note, and the parties' negotiations did nothing to change that fact. The Carrier emphasizes that the only change agreed to during the negotiations was the change in the method of pay for regularly scheduled employees, and nothing more.

The Carrier asserts that to the extent that it can be argued that the language of the Note to Article 14 is ambiguous, the Carrier's past practice for more than 17

years of not paying time or mileage to employees taking medical exams upon return from furlough constitutes conclusive evidence of the parties' intent. The Carrier argues that Article 14 never has contemplated payment in such circumstances, and the revisions to this language over the years have not expanded to whom the Rule applied.

With regard to Article E, the Carrier emphasizes that this provision does not apply to either Claimant because they were not required to be away from Carrier property, nor were they on Carrier business. The Carrier points out that the Claimants' return to service from furlough unquestionably was triggered by a voluntary exercise of seniority. Under Paragraph 3 of Article E, no mileage expenses are to be paid for the exercise of seniority, so the Claimants are specifically denied the right to receive a mileage allowance.

The Carrier asserts that the Claimants simply do not qualify for any payment of time or mileage under either Article 14 or Article E. As prior Awards have held, in the absence of express contractual language requiring payment to the Claimants in the instant circumstances, this claim cannot be sustained.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to compensate the two Claimants for time and travel costs in connection with return-to-work medical examinations. Therefore, the claim must be denied.

It relies on two sections of the Agreement, which the Organization states clearly require the Carrier to pay the time and expenses for employees to travel to and from their medical examinations. The first one is Article 14, which states, in part:

> "A. Employees may be required to take periodical medical and rules examinations. Medical examinations shall not be more frequent than one (1) each year, unless required for promotion,

modification of conditions or return from furlough, Rule G compliance or leave of absence, or, if, in the opinion of the supervisory Company Officer the employee's health or condition is such that an examination should be made for the purpose of informing the employee of any disability.

NOTE: The company will pay the costs associated with all required medical and Rules examinations. (Article E – Expenses of the Quality of Work Life Agreement shall apply to employees taking such examinations). In addition, when such medical or rules examinations take place outside of an employee's regularly scheduled hours, the employee will be compensated for the actual time required to take such examinations at the time and one-half rate of the last service performed. If the employee fails the first examination and any subsequent examination is required outside of an employee's regularly scheduled hours, the employee will be compensated for the actual time required to take such re-examination at the straight time rate of the last service performed. Such payments are not applicable when an employee elects to take an examination for modification of medical restrictions."

The second provision relied upon by the Organization is Article E, which states, in part:

"1. An employee not returned by the Company to his headquarters point after close of shift will be reimbursed for the equivalent cost of reasonable and necessary expenses incurred in such away-from-headquarters service, as follows. . . .

2. An employee required to be away from MRL property on company business will be reimbursed reasonable and necessary expenses.

3. If an employee has a vehicle which he is willing to use and the Company authorizes him to use said vehicle for company

business, the employee shall be compensated for such transportation on a mileage basis, at the maximum allowable non-taxable IRS rate. No mileage will be paid for exercising of seniority."

A close review of the above Agreement provisions makes it clear that the language refers to regularly scheduled employees who are required to take periodic medical and Rules examinations. Those are the employees that the language protects with respect to any expenses or hours that are incurred when traveling to and from medical examinations. There is no mention of return-to-work examinations in either one of those Articles.

The Carrier has come forward with a defense that the past practice has always been that employees were not reimbursed for their time and expenses traveling to return-to-work medical examinations. The Organization has really not overcome the evidence submitted by the Carrier with respect to this past practice.

The Organization correctly asserts that if the language is clear and unambiguous, it would overrule any past practice that may be in existence. Unfortunately for the Organization's case in this matter, the language is clear and unambiguous that the medical examinations for which employees are reimbursed time and expenses are the ones for currently scheduled employees. There is no mention in either Article of return-to-work examinations.

Consequently, the past practice that was set forth by the Carrier prevails. Because the past practice confirms that employees are not reimbursed for their time and expenses when traveling to return-to-work examinations, the Board is compelled to deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of June 2009.