# Award No. 151
# Docket No. 139
# 2-EJ&E-FT-'37

## NATIONAL RAILROAD ADJUSTMENT BOARD
## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee John P. Devaney when award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 88, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (FEDERATED TRADES)

## ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

**DISPUTE: CLAIM OF EMPLOYES:** The employes contend that the carrier has violated its agreement with System Federation No. 88 by requiring employes who have been furloughed for six months or longer to undergo a physical examination when called back to service, and by requiring new employes to undergo a physical examination before being put to work.

**EMPLOYES' STATEMENT OF FACTS:** In May, 1933, the carrier inaugurated the practice of compelling employes in the mechanical department who had been furloughed six months or longer, to undergo a physical examination when called back to service. Prior to May, 1933, neither applicants for employment nor employes returning to service were required to pass a physical examination.

**POSITION OF EMPLOYES:** The employes state that the carrier has always been well aware of the fact that the mechanical department employes have always been opposed to physical examinations.

The employes further contend that to require a physical examination violates Rule 42 of the agreement and the past practice of the System. Rule 42 provides:

> **"Applicants for Employment:** Applicants for employment will be required to meet the company's requirements, embodying the first thirteen questions of form 195."

The employes point out further that the first thirteen questions of form 195 are not questions relative to physical condition with the exception that question 13 merely asks whether a physical examination has ever been made and whether or not the applicant was accepted or rejected. They assert that when Rule 42 was agreed upon the employes were opposed to any type of physical examination, whereupon it was finally agreed between the employes and the carrier that the first thirteen questions only would be required to be answered. The questions following question 13 in form 195 are questions relative to physical condition and are obviously with reference to physical examination.

The employes therefore contend that Rule 42 prohibits requiring any information of the employes other than that contained in the first thirteen questions and therefore prohibits a physical examination which was the intent of the said rule.

**POSITION OF CARRIER:** The carrier takes the position that it has the right to require physical examinations of any and all of its employes includ-

ing employes of the mechanical department. It points out that Rule 42 does not prohibit physical examinations. It claims that question 13 of form 195 indicates that a physical examination is proper. Question 13 reads as follows:

> "Have you ever before made application for employment and been subjected to a physical examination? If so, when..... where..... and by whom was examination made? .....Were you accepted or rejected?....."

The carrier emphasizes the word "before" contained in the question and states that this word indicates that a physical examination is contemplated as part of the application for employment to be made with the use of form 195.

It is further argued that Rule 42 does not refer to furloughed employes but refers only to applicants for employment. Therefore, the employes are mistaken in arguing the effect of Rule 42 with reference to furloughed employes.

The carrier further argues that Rule 42, if it is applicable, states minimum requirements only and that there is no limitation in the rule to indicate that meeting the requirements of the first thirteen questions shall be meeting the maximum requirements.

The carrier further argues its legal duty to provide safe conditions for fellow employes and for other people who come in contact with the employes and for people who might be endangered if the employes were not physically fit.

**OPINION OF THE DIVISION:** The question involved here is whether the carrier has the right to require furloughed employes to submit to a physical examination before returning to service.

The record indicates that when Rule 42 was adopted there was considerable dispute concerning form 195. The questions in form 195 following No. 13 clearly have to do with a detailed physical examination. The employes objected to this form because in its entirety it would require applicants for employment to submit to physical examination which they were opposed to. It was finally agreed that only the first thirteen questions of form 195 would be incorporated into Rule 42, and, therefore, Rule 42 contains the requirement that the employes must meet the conditions of the first thirteen questions.

In our opinion Rule 42 clearly prevents the carrier from adopting the practice of requiring physical examinations for furloughed or new employes. The decision of this Division in Award No. 16 is controlling.

In that award, as in this case, there were no express terms prohibiting the carrier from requiring employes to submit to a general physical examination.

As pointed out by Division therein, it was arguable that the rule in dispute standing alone would perhaps have authorized the carrier to require a physical examination. It was pointed out, however, that the rule in question had to be construed in the light of its history.

It was further pointed out that not only the history of the rule, but the wording of the rule itself showed apprehension and suspicion on the part of the employes and indicated an intent not to permit a general physical examination. Referee William H. Spencer, sitting with the Second Division on this award, stated:

> "The question of physical examinations has long been a bone of contention between carriers and employes. Carriers have insisted upon the right to conduct physical examinations for the purpose of determining the fitness and ability of employes for service. The employes, while stating that they would have no objection to a properly defined physical examination, have felt that carriers have resorted to it as a

subtle device for discriminating against employes and for improperly reducing forces. It was in this atmosphere that the antecedent of Rule 42 came to be incorporated into the National Agreement, and to receive the interpretation placed upon it by the United States Railroad Labor Board. The rule itself breathes the apprehension and suspicion of employes in the statement that 'applicants for employment will be required to make statements only as to their ability and address of relatives, and name and address of last employer.' "

The wording of the rule in question in this case not only "breathes the apprehension and suspicion of employes" in the language employed, but further shows that the only questions contained in form 195 on which the parties could agree were the first thirteen. In view of the fact that the questions following question 13 have to do with the physical examination it is clearly established that the parties agreed only to requirements which eliminated the possibility of general physical examinations.

In our opinion, therefore, Rule 42 read in the light of its history and, with reference to the arrangement of questions contained in form 195, clearly prohibits the practice of the carrier as inaugurated in this case.

We do not agree with the contention of the carrier that Rule 42 refers only to applicants for original employment and not to furloughed employes. There could be no sound reason for requiring physical examinations of furloughed employes and not employes making application for original employment. To so hold would be to place the employe who has given many years of service to the carrier in a position far more disadvantageous than that of an applicant for original employment.

Nor do we agree that there is anything in the language of question 13 which indicates that a general physical examination is authorized. The emphasis by the carrier on the word "before" does not, in our opinion, indicate a physical examination is contemplated. The history of Rule 42 and the wording of Rule 42 so clearly indicate an intention to avoid physical examinations as to far overshadow any possible intention which could be read into the rule because of the use of the word "before."

The claim of the employes must be sustained.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

That the carrier has violated its agreement with System Federation No. 88 by requiring employes who have been furloughed for six months or longer to undergo a physical examination when called back to service, and by requiring new employes to undergo a physical examination before being put to work.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 23rd day of April, 1937.