Award No. 184

Docket No. 159

2-CRI&P-CRI&G-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.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (FEDERATED TRADES)

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY

(J. E. Gorman, J. B. Fleming and F. O. Lowden, Trustees)

DISPUTE: CLAIM OF EMPLOYES: That physical re-examination of employes is a violation of Rule 45 of the present agreement between the above named parties.

EMPLOYES' STATEMENT OF FACTS: The management by certain operating rules require employes in the mechanical department, who have been out of service ninety (90) days or more account of force reduction or leave of absence, to take physical re-examination before again entering service.

POSITION OF EMPLOYES: The language of Rule 45 was not intended to incorporate re-examination of employes and no other rule of the agreement provides for such.

"RULE 45. APPLICATION AND PHYSICAL EXAMINATION

"Men seeking employment will make out application on form prescribed by Railway, therein stating their qualifications, and must fulfill all requirements of the qualifications specified in the application."

The management prescribed Form G-125, which contains the physical examination required on entering the service but does not contain any requirement that employes shall take further re-examination.

The employes fulfilled their part of the agreement at the time of first employment and to subscribe to re-examination following furlough or leave of absence for periods of ninety (90) days places in the hands of the management a weapon for disqualifying employes who have rendered many years of service.

During the negotiation of the present agreement the employes submitted the following rule:

defects which may exist before it is too late. If for no other reason, the organization and its members should be grateful for such a plan, because it insures that men who have been working in outside employment are, upon return to our service, in proper physical condition to do their work without a hazard of injury to their fellow employes.

This carrier has expended a considerable sum of money over a period of years in re-examining its employes. Without doubt, such re-examinations have been of inestimable value to its employes in that physical defects have been disclosed of which the employes had no knowledge, and as a result of such condition being made known to them the employes as a whole and individually have profited to a far greater extent than the carrier; a better health condition has prevailed, and certainly many employes have thus avoided a loss of earning power because of ill health.

In the absence of a provision in the agreement governing the working conditions of mechanical department employes, giving the employes or their representatives the responsibility of determining the physical condition of the employes, the carrier must be considered as having the sole right to determine how, when and where physical examinations and re-examinations will be given to its employes. The employes' instant request is that your Board give them a new rule which will deny to the carrier the right to determine whether an employe is physically able to do his work. In fact, the claim in its broad sense is that the employe is the sole judge as to whether he is physically able to perform his duties. Such a plan would result in detriment to the health of the individual as well as his fellow workers if he is in fact physically defective, and often such defects can only be determined by a competent physician. It is the fundamental and recognized right of any employer to say who may enter his service and to prescribe the conditions of employment which will be required of such person after entering his service. Such a right can be taken from the employer and given to or divided with the employes only through an agreement to do so. There is no such agreement in the instant case and the employes' protest cannot be sustained under the shopmen's schedule and the law which created this Honorable Board.

OPINION OF THE DIVISION: The issue here involves the long drawn out controversy between the employes and the management over the question of physical examinations. It is unfortunate that these two groups stand in fear of each other on the question of application of physical examinations. Periodic physical examinations must be conceded by everyone to be highly desirable and in keeping with every enlightened advance that has been made by civilized people.

There is, however, a not unjustified fear on the part of employes that the requirement of physical examinations may be used as a method for discriminating between employes for various improper reasons, and until this element of fear is removed, by the adoption of rules and regulations, through the medium of fair and open negotiation, we have no choice but to render our decision in light of the already existing rules.

Rule 45 of the agreement in question provides only for the physical examination of applicants for original employment. It cannot seriously be argued to the contrary.

The argument of the carrier to the effect that the employes' claim amounts to a request that this Board give to employes a new rule is without merit. In fact, were we to hold in accordance with the position of the carrier, it would be tantamount to creating a new rule providing for physical re-examinations for employes who have been out of service ninety (90) days or more on account of force reduction or leave of absence.

There is at the present time no provision in this agreement providing for re-examination of employes. Moreover, there is nothing in the record or in the history of the controversy between the employes and the management on

this important question that would indicate that the employes were ever willing that such a practice be adopted. The language of Referee William H. Spencer in a decision of this Division in Award No. 16 is particularly applicable:

> "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. . . ."

In light of the conclusions reached in Awards No. 16 and No. 151 of this Division, we have no alternative but to conclude in favor of the position of the employes. 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. 6 by requiring physical re-examination of employes when called back to service.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 9th day of December, 1937.