Award No. 482
Docket No. 460
2-NYC-SM-'40

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (SHEET METAL WORKERS)

NEW YORK CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That physical re-examination of employes is a violation of Rule 46 of the present agreement between the New York Central Railroad Company and its employes, and Sheet Metal Worker William Bahn should be paid from March 6 until his retirement, April 26, 1939.

JOINT STATEMENT OF FACTS: William Henry Bahn entered the service of the New York Central Railroad Company in the capacity of plumber, on January 23, 1917. He was given a physical examination at that time, and indicated that he had lost his right eye in 1905 while working at the State Capitol Building, Albany, N. Y.

In January, 1939, the local management requested Bahn to report to the company occulist for examination. Upon Bahn's failure to comply, Division Engineer Jones notified him, under date of February 28, to report for hearing in his office on March 6.

At the hearing on March 6, Bahn was accompanied by Local Chairman Cox; Division Engineer Jones, Supervisor Burke and Foreman Fitzmyre represented the management. Mr. Jones again requested Bahn to submit to a visual examination. He again refused, and thereupon was taken out of service.

Mr. Bahn resigned as of April 26, 1939, to apply for an annuity under the Railroad Retirement Act.

POSITION OF EMPLOYES: Rule 46 of the New York Central Agreement is similar to the National Agreement Rule 46, inasmuch as neither rule provides for physical examination during employment. For that reason, the employes call the Board's attention to Decision No. 1362, rendered by the United States Railroad Labor Board. When the New York Central Agreement was negotiated, a physical re-examination rule was not agreed to for reasons best set forth in Award No. 16 by your Board and Referee William H. Spencer, as hereinafter quoted:

> "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 de-

spective positions. While this liability does not give a carrier a license to hold employes out of service at will, where it acts in good faith and upon facts that justify such action it is clearly within its rights under the prevailing agreement.

* * *

* * * Mr. Deveson was removed from service on advice of the Chief Medical Officer of the carrier that he considered Mr. Deveson unsafe for service because of his high blood pressure. It seems to us that where the question of safety to the public is involved the carrier is entitled to hold an employe out of service on advice of its Chief Medical Officer, or other qualified physician, that he considers the employe unsafe for service. This does not mean of course that the employe does not have the right to question the truth of such medical opinion, and if found to be untrue the rights of the employe would be the same as in other cases where the carrier acted improperly towards an employe. Here, however, there is no question as to the fact that this employe was suffering from high blood pressure. His own physician found his blood pressure 220 systolic on December 28, 1936, the day he was held out of service.

* * *"

It will be noted that the foregoing opinions of referees in the Third Division cases are general, and applicable regardless of class or craft and the absence of specific provisions of agreements.

Under the circumstances involved in the instant case, your Board will recognize that the action of the management in requesting Bahn to submit to an examination by a company oculist was reasonable and not violative of the agreement.

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.

These findings and opinion apply to the following dockets:

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They will be discussed together because they have one feature in common which is that the organization insists that the crafts here involved are not under the schedules subject to physical re-examination.

There is some controversy over the provision concerning examination involved in the rule governing application for employment. It is unnecessary, however, to pass upon that rule since no rights exist in favor of the applicant until he in fact becomes an employe. The question here is over the claimed right of the carrier to require physical re-examination after employment, either from time to time at stated periods, or arbitrarily.

In this discussion there is excluded certain of the craft whose duties take them where they might be required to take or pass signals. This necessarily requires certain standards of hearing and vision and the practice seems to be that examination as to hearing and visual acuity is required when deemed necessary.

As to the other members of the crafts here involved, it is earnestly insisted by the organization that the carrier has no right once a man has been taken into service to re-examine him physically, either generally or specially. The question is not new and was ruled in favor of the employes during Federal control. The question was squarely before this Division in its Award 184 and it was there decided that the carrier had no right to require physical re-examination.

The carrier cites several decisions from the First and Third Divisions sustaining the right of the carrier to require physical re-examination. These cases, however, are inapposite pertaining to other crafts whose duties were such as to make it necessary that they be at all times up to certain physical standards. The cases are, however, pertinent to this extent that they all recognize that it might not be done arbitrarily. The vice apprehended by the organization here is that if it were allowable, it would be utilized for purposes of discriminiation; as for instance, when reduction of forces might be contemplated, a carrier might single out older employes whom it might consider to have slowed down in their years of service to less dexterity and speed than employes having much junior seniority and order such older ones to a physical examination; that a physician would have no difficulty in finding some ailment with the older man which would be used as a pretext for taking him out of service. Whether the apprehension is warranted or not is of no concern since it must be held that in the light of the history of conflict on the subject since the National Agreement down to the present, the organization has consistently refused to agree to any concession on the subject; that under the agreements, physical re-examination cannot be required of employes in this classification, either periodically or arbitrarily. Since there is no intent involved on the carrier's part to require periodical examinations, that subject may be left aside and is simply adverted to for what light it throws on construction of the agreement.

The real question, then, is what would constitute an arbitrary requirement. No matter though it be held in general that physical re-examination of these employes may not be required, there must be some limit to the contention that the carrier cannot require such re-examination under any circumstances. We do not think it can reasonably be argued that there are no circumstances in which it may not be required. For example, where a change in the employe's condition has occurred that is of such a nature as to be obvious and likely to subject not only such employe but fellow employes to much hazard, the carrier acting in good faith, must be conceded the right to investigate to determine if his condition is such as actually to be hazardous. On the other hand, this does not include the right to require one on mere suspicion; a fishing expedition designed to find grounds to disqualify a man; nor to review a condition existing at the time of his employment with the object of changing the decision as to his physical ability so as to disqualify him; and certainly it does not embrace the right to re-examine with the object of disqualification for mere normal inroads of age. Indeed, this last it is contended is the most objectionable grounds of all. Where, however, a serious accident has occurred, or a serious illness experienced such as to make it apparent to anyone that the man's condition had so changed as to make it probable that his resumption of duty would constitute a serious hazard, it is but reasonable to assume that the carrier has the right to protect itself and fellow employes. In this class of cases, it frequently occurs that the man recovering, obtains from his own physician a certificate to the effect that he is now physically fit. On the other hand, the carrier's physician may, in good faith, disagree with this opinion. In such a case, common fairness requires that the question be submitted to an independent physician. This has been directed by Division One in such a case. Throughout it should be borne in mind that defects such as might disqualify a man in some other craft or class do not do so here. United States Railroad Labor Board in its Decision 2159 drew this exact distinction in the case of an employe of the class here involved as not being incapacitated by the loss of one eye.

Proceeding then to a consideration of the individual dockets.

This case involves a sheet metal worker who was taken out of service March 6, 1939, because of his refusal to submit to a physical re-examination. The demand for physical re-examination was based on a belief that his vision was too poor properly to attend to his work.

At the time of his employment in 1917, one eye was missing. There seems to be some controversy as to whether the remaining eye had become seriously impaired in the meantime. The facts indicate that up to the time of his dismissal he was performing his work and was even assigned by his foreman to work alone between the tracks in the station. It is also in evidence that after being taken out of service, he worked alone installing a boiler and heating equipment. It is reasonably inferable from the record that the faults charged against him had existed all along and we do not think this case presented one warranting removal from service for refusal to submit to physical re-examination, and accordingly we consider such action unjustified. He voluntarily retired April 26, 1939; consequently, he should be paid for time lost from March 6, 1939, to April 26, 1939.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 11th day of July, 1940.