Award No. 483
Docket No. 465
2-CRI&P-CRI&G-CM-'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. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F OF L. (CARMEN)

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

CHICAGO, ROCK ISLAND AND GULF RAILWAY

DISPUTE: CLAIM OF EMPLOYES: That Mr. Joseph M. Keller, carman (lead car inspector) at Liberal, Kansas, be compensated for all wage loss, including 5¢ per hour differential paid lead workmen from December, 1935 to March 14, 1939.

EMPLOYES' STATEMENT OF FACTS: That Mr. Joseph M. Keller entered the service of the carrier on or about August 4, 1922, and worked continuously in the capacity of car repairer, car inspector and lead workman until December, 1935, when he was then summoned to appear before a Dr. Pitman, company physician, at Pratt, Kansas, for eyesight examination and was later disqualified for inspection work by the division superintendent and division master mechanic as a result of the physical examination.

Mr. Keller was returned to service as lead car inspector-repairman on March 14, 1939, following agreement reached between Superintendent of Motive Power S. E. Mueller, and General Chairman J. C. Arrington, dated March 11, 1939. (Exhibit A)

POSITION OF EMPLOYES: Rule 45, Application and Physical Examination, became a rule of the present agreement between management and employes effective October 1, 1935.

Controversy existed as to proper intent and purpose of the language contained therein with a result the case was referred to the National Railroad Adjustment Board, Second Division, and the Board in Award No. 184 sustained the position of employes (Exhibit B), but despite this decision rendered, management has persisted in notifying employes to submit to physical examination (Exhibit C). The employes feel it is unnecessary to quote the present rule or to delve into any lengthy written argument on its language, as we believe the printed record marked Exhibit A suffices. We do assert that management violated this rule in requiring Mr. Keller to take physical examination in December, 1935, and behind the action held a motive; that motive was, clearly and distinctly, to remove Keller from the lead man position as director over all the car force at Liberal and bar him from car

enable him to handle properly and that it should not, therefore, now be unjustly penalized by paying this person compensation which he did not earn.

Further, it will be noted that Mr. Keller, in person, made no claims under any of the agreements that he should be allowed compensation, and even if there were merit in the claim, which the carrier denies there is, Rule 35 of the present agreement would bar any consideration of reparation prior to ten days from the date claim was presented in his behalf by General Chairman Arrington October 21, 1938.

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 the 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 discrimination; 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 to be 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.

There are two angles to this claim. The employe had occupied the position of lead carman at Liberal, Kansas. He was arbitrarily removed from the position of lead carman and another man placed on the work. The position of lead carman pays a differential over that of carman. He continued working on as a carman at least up to February 25. There is nothing to indicate that his physical condition was accountable for this change. In December, 1935, of his own volition, the employe consulted the Hospital Association physician, who was also the company physician, concerning the condition of his sight. He was sent by this physician to an eye specialist and was found to be almost totally blind. He was taken out of service about three months later on the ground that he could not perform his work. From time to time thereafter, he worked on car repairing and building. On his own statement of the situation, during some portion of the time when he was not so engaged, he also suffered an illness. Meantime, however, he began seeking reinstatement to his position as lead carmen, claiming that his vision had sufficiently improved to entitle him so to do. As a condition of allowing return to work as a carman in April, 1936, he was required to sign what has been termed a waiver, in substance being

to waive all claims and agreeing that he was not to be used in the capacity of a car inspector until such time as his vision might improve, and agreeing further to report for examination at six months intervals. This he failed to do. The employes' position, however, is that this so-called waiver was without consideration since he was entitled as of right to work as a carman and it is claimed he was not required to stand a physical test or examination as to his sight, and attention is called to Decision 2159 of the United States Railroad Labor Board to the effect that the loss of one eye was not sufficient to disqualify a man in the shop crafts. We agree that the waiver was without consideration. He did undergo examination from time to time at each of which his vision in the bad eye was found to be not passable for an inspector's position, the last of which such examinations appears to have been April 25, 1937.

Claim that he had been improperly removed from the job of car inspector and his compensation for time lost in that capacity, was first asserted October 21, 1938, and under date of December 26, 1938, he presented a certificate from two physicians to the effect that upon examination they found his eyesight such as to be passable. Nowhere does the evidence disclose just when his sight had sufficiently recovered, but apparently it was some time between April 25, 1937, and October 21, 1938. After some negotiation concerning this claim, on or about March 10, 1939, an examination of his condition was held by laymen officials and it was found that his vision was such that he was entitled to be restored to duty. Thereupon it was agreed to restore him to duty, but no agreement could be reached on the claim for compensation.

We consider he is entitled to the 5¢ differential, on the dates he was available and his successor was paid it, between the two positions from the time he was relieved of the lead position in December, 1935, to the time he was cut off altogether, evidently some time in March, 1936, the exact date not being in evidence. The carrier waived the limitations provision of the grievance rule. Further, that he is entitled to compensation from the date October 21, 1938, when he demanded restoration to his position up to the time when he was restored to the position. We do not find any basis in the evidence for the intervening period of time, apparently about March, 1936, to October 26, 1938.

The question of re-examination was not involved because he might properly have been disqualified, although the examination may not have been required. The evidence abundantly shows he was in fact disqualified.

AWARD

Claim disposed of as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

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