Award No. 722

Docket No. 685

2-NYC-MA-'42

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee R. F. Mitchell when award was rendered.

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That the shop craft rules and agreement were violated by management in refusing to allow James H. Norris, machinist helper at Harmon Electric shops, to return to work. Claim is also made for all time lost by Norris while held out of service.

JOINT STATEMENT OF FACTS: J. H. Norris entered the service of the railroad company on April 8, 1926, as machinist helper in the electric shop on the electric division at Harmon, New York.

On October 4, 1940, Norris applied for and was granted a leave of absence on account of sickness.

Norris reported for work on April 3, 1941, at which time he presented a certificate from his doctor stating he was physically fit to resume his duties. Before being permitted to go to work, however, Norris was instructed to report to the company's physician for a return-to-service physical examination. He submitted to physical examination by the company's physician on April 4, 1941, and was disqualified for return to service. Norris has not been permitted to return to work.

POSITION OF EMPLOYES: That the agreement was violated in management refusing to allow James H. Norris to resume his duties as the agreement excludes physical re-examination of employes; therefore, we contend that James H. Norris is entitled to pay for all time he has been held out of service and should be returned to his former position.

Mr. Norris presented certificate from Dr. Charles L. Brieant as to his physical condition being such that he was able to resume his duties as a machinist helper.

This certificate was required by the New York Central Railroad Mutual Relief Association, same being a mutual association of New York Central employes.

Upon presentation of this certificate to the N. Y. C. R. R. M. R. A., Mr. Norris' sick benefits were terminated. Later, Mr. Norris, due to his being held out of service, again went to Dr. Brieant for examination, at which time he was found physically fit.

See employes' Exhibits A and B.

sickness, or for any other good cause, shall notify his foreman not later than the close of the first day's absence, if possible. Employe should notify his foreman of his intention to return to work as soon as possible.

Rule 46—Applicants for employment:

Applicants for employment may be required to take physical examinations at the expense of the carrier to determine the fitness of the applicant to reasonably perform the service required in his craft or class. They will also be required to make a statement showing address of relatives, necessary four (4) years' experience, and name and local address of last employer.

Rule 22 protects an employe from being discriminated against, and requires him to notify his foreman of his absence from and his intention to return to work, but places no proscription on the management's taking precautionary measures to ascertain whether an employe, who has been absent on account of critical physical condition, has corrected by treatments the ailment which necessitated his protracted absence and is, in fact, a safe employe to return to service.

Rule 46, as its designation implies, is applicable to "applicants for employment," and was never intended to bar the taking of precautionary measures, as in this instance. In fact, there is nothing in any of the agreement rules which deals with the circumstances encountered in this case.

In view of the absence of any support under the rules of the agreement, management holds that the claim in this case is unwarranted. It also holds that its course throughout has been fair and reasonable, evidence of which is found in its desire to have Norris examined by the chief surgeon and its offer at the meeting on June 24, 1941, to agree with the committee to have Norris examined by an independent physician, if the chief surgeon reported unfavorably.

From the employes' contentions in this case, it seems clear that they expect the Board to find in their favor in the following respects—

1. The agreement precludes the carrier from requiring an employe to take physical examinations under any circumstances;
2. Norris should be returned to service now without regard for his physical condition and paid for alleged loss of earnings subsequent to April 3, 1941;
3. The Board should substitute its judgment for that of the company's doctors in a matter of this nature in disregard of the developments in the Holstein case.

If your Board should conclude that management's contentions in this case are wrong and sustain the employes' contentions, we think that the Board should thereupon give consideration to the pertinent question of whether it is disposed to assume such responsibilities as may ensue if and when Norris is restored to service without further examination.

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.

The controversy over physical examinations and re-examinations is one of long standing between the carriers and the employes. It has been before this Board on many occasions. In Award 481, the Second Division, speaking through Referee Swacker, said:

"* * * 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 loss of one eye.

* * * *"

And in a later Award No. 548, this Division held:

"* * *

Though it has been held in general that physical examinations may not be required of these employes, there must be some limit to the contention that the carrier cannot require such examinations under any circumstances. It would not be reasonable to contend that there are no circumstances in which it may not be required.

A change in the employe's condition of such a nature as to be obvious and likely to subject not only such employe but fellow employes to much hazard, would give the carrier the right to investigate to determine if his condition is such as actually to be hazardous. It does not embrace the right to examine for mere inroads of age.

* * *"

Thus we find that the carrier does not have a right to generally or arbitrarily require physical re-examination of a furloughed employe, but under the holdings of this Division, where circumstances have arisen which makes it

evident to the carrier that a man's condition has decidedly changed from that of the time of his entrance into the service and in such a way as to probably make him a hazard, it is but reasonable that the carrier should in such case be entitled to a re-examination before being required to assume the risk of his reinstatement.

With these rules in mind, we turn to the record in this case. It is submitted upon a joint statement of facts. Norris entered the service on April 8, 1926, as a machinist helper. On October 4, 1940, Norris applied for and was granted a leave of absence on account of sickness. On April 3, 1941, Norris reported for work, at which time he presented a certificate from his doctor stating he was physically fit to resume his duties. Norris was instructed to report to the company's physician for a physical examination. He did this without objection as far as this record is concerned. The company physician, on April 4, 1941, disqualified him for return to service. In view of the fact that he submitted to the examination without protest and the record shows that he was found by the company physician not to be in physical condition to work, there being no showing that this finding was an arbitrary one, we cannot allow the claim as made. The case should be remanded if the party desires to return to work, with instructions that the parties pick a disinterested doctor to examine Norris to ascertain whether or not he is physically fit to return to work. If the disinterested doctor finds that he is fit to return to work, Norris should be reinstated.

AWARD

Claim remanded as per the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 30th day of March, 1942.