Award No. 236
Docket No. 215
2-IC-MA-'38

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (MACHINISTS)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: Request that James McLean, machinist, Nonconnah roundhouse, Memphis, Tenn., be returned to service with seniority rights unimpaired and compensated for all time lost by him since March 5, 1937, and until he is returned to service, due to being discharged on March 5, 1937, for placing the wrong date of his birth on his application for employment.

EMPLOYES' STATEMENT OF FACTS: James McLean served his apprenticeship on the Illinois Central Railroad, finishing his apprenticeship on December 31, 1904, under Master Mechanic F. B. Barclay at Memphis, Tenn., and has worked at different points on the Illinois Central Railroad since that time.

On May 1, 1936, James McLean was re-employed at Nonconnah roundhouse on the Illinois Central and worked until March 5, 1937, at which time he was removed from service on the alleged grounds that he had falsified his age on his application for employment.

POSITION OF EMPLOYES: Is that James McLean admits he did not give his correct age when he applied for a position as machinist at Nonconnah on April 30, 1936, and that this was done with the knowledge of the local officials, who were well aware of the fact that he did not give his correct age, due to his having worked under these same supervising officials three different times. All concerned were aware of McLean's actual age. The current agreement between the Illinois Central System Federation No. 99 does not include as a requisite that an applicant for employment may give his age, nor does it include any penalty to be applied to any employe who may have mis-stated his age. Rule 45, which we herein quote, covers the requirements for applicants for employment:

> "Rule 45. Applicants for employment may be required to take physical examination 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."

We also quote herein Rule 40—Establishing Competency.

The employes contend principally that the joint agreement between the parties governs and they quote Rule 45 about physical examinations as evidence that the carrier's forty-five year age rule is not in force. Further, they contend that the thirty-day provision in Rule 40 established the competency of this employe and that the carrier slept on its rights in permitting McLean to continue for ten months.

The carrier contends principally that employment of new workers is a managerial function and the requirement for applicants for employment is not governed by the agreement with employes; that the forty-five year age limit is of long standing and within the competence of the carrier to make; and that Rule 40 has no bearing on the case.

The injustice of the age rule is discussed at length in the record but this discussion is not in point. This Division is not called upon to pass upon the merits of the employment rule in this case, whatever the opinion of the members or the referee may be as to its advisability. The rule was in force when McLean made application for employment and McLean would not have been hired if the application blank had carried his true age. McLean was not an employe at the time and could not have complained against the carrier on account of the age limit fixed, however much he may have felt the injustice of it. He took a chance that the mis-statement would not be discovered or would be overlooked.

The claim that thirty days service established his competency and got him safely by the employment rule is not established by a full reading of the agreement. Rule 40, relied upon, relates to competency as a workman and has no bearing upon mis-statements in an application blank. Rule 45 establishes certain things that may be required or will be required, but does not exclude other rules of the carrier governing the application for employment. The forty-five year age rule was not abrogated by any express terms of the agreement between the employe and the carrier and abrogation cannot be implied from the terms of Rules 40 and 45. These rules cannot be accepted as exclusive.

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 carrier fulfilled the requirements of the Act and the agreement as to hearings and was within its rights in discharging McLean for the cause stated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 20th day of May, 1938.