Award No. 367
Docket No. 331
2-TRRAofStL-FT-'39

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. 25, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (FEDERATED TRADES)

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

DISPUTE: CLAIM OF EMPLOYES: That the carrier has violated the provisions of Rules 46, 60½, and 183 of the agreement by arbitrarily requiring recalled furloughed employes to undergo a physical examination before being permitted to resume work, and by requiring new employes to undergo physical examination before being put to work.

JOINT STATEMENT OF FACTS: Paragraphs 1 and 3 of the company's current application form read as follows:

> "1. All applications for employment as conductor, engineman, fireman, hostler, assistant yardmaster, switchman, switchtender, and such other positions as may be designated by the employing officer, must be written with ink on this blank, by applicant personally, in the presence of and witnessed by the employing officer or authorized representative. When this blank is filled out in accordance with the instructions herein, the applicant may be allowed to enter the service subject to approval of application, provided there is need for his services, and he has passed a satisfactory examination, PHYSICAL AND OTHERWISE."
>
> "3. Applicants for employment must pass a satisfactory physical examination before entering service, including an examination on sight and hearing. Report of such examination will be made on this form by the examining Surgeon. Applicants for positions in train service, and all other employes who by reason of their occupation are required to interpret color signals, must also pass a satisfactory examination on colors. Re-examinations may be ordered at any time by proper authority."

Similar provisions have been contained in application forms for many years.

The company had never exacted physical examinations for employes other than those in train and engine service until December, 1936. On December 8, the following instructions were issued:

> "Effective at once, all new employes, with the exception of track laborers, should be required to fill out applications and take physical examinations before entering the service."

supplemented by the following on December 15:

"Since writing you we have decided to waive examinations for furloughed employes unless they have been out of service over a year."

On February 16, 1937, we replied, reiterating:

"We are opposed to any physical examination being instituted for shop craft employes."

The employes believe that Rule 46 should be construed in the light of its history. In February, 1923, when the present rule was adopted there was no discussion concerning Rule 46. The carrier was well aware of the fact that the employes were unalterably opposed to physical examination and acquiesced in our thought that the rule as written did not contemplate physical examination. The standard form of application blank referred to in the rule carried no provisions for physical examination, other than the question:

"Are you willing to submit to a physical examination by the chief surgeon?"

With reference to the above question, the employes vigorously contend that it is irrelevant and in defense of this position we wish to direct the particular attention of the Honorable Board to the incontrovertible fact that this is the identical application blank that was in effect prior to and during the life of the National Agreement when physical examinations were prohibited. Incidently, it has been the standard form until the origin of the present controversy. We are submitting the above referred to application blank marked, and hereinafter referred to as Exhibit 1, the new standard form of application blank marked, and hereinafter referred to as Exhibit 2, and Medical Examiner's Report Physical Examination (for employes returning to service after furlough), marked Exhibit 3, as part of the record in the case.

Some time after the notice of December 16, 1936, the carrier substituted the new form Exhibit 2 and arbitrarily extended its requirements to the shop craft group, and also forced recalled furloughed employes to submit to a physical examination before permitting them to resume work. (See Medical Examiner's Report of Physical Examination, Exhibit 3.)

This case has been handled in accordance with the provisions of Rule 35, and, briefly summarizing, the employes contend as follows:

A. That Rule 46 as written does not contemplate, or authorize physical examination for applicants for employment.

B. That there is at the present time no provision in the agreement requiring recalled furloughed employes to submit to physical examination before being permitted to resume work.

C. That the substitution of the new form of application blank (Exhibit 2) for the one in effect when the current agreement was negotiated (Exhibit 1) emasculates Rule 46 and deprives the employed of the benefits they have long enjoyed under the rule.

POSITION OF CARRIER: As outlined in the Joint Statement of Facts, we did not require physical examination of any of our employes except trainmen and enginemen prior to December, 1936, although our right to do so is fully covered in paragraph 3 of the regular application required of all employes, quoted in full in the Joint Statement of Facts. The significance of the first statement of that paragraph, "Applicants for employment must pass a satisfactory physical examination before entering service," is readily apparent.

Rule 46 of the shop crafts' agreement, the only one dealing with applications, providing that "employes when entering the service shall be required

to furnish necessary information called for by the company's standard form of application blank," does not in any manner restrict our right to forego or impose physical examinations at our discretion. Although it is claimed by the organization that when the rule was agreed upon it was understood by both parties that physical examinations would not be imposed, our representatives, parties to the last contract negotiations have no knowledge of any such agreement, although it was probably stated at the time of the negotiations that we had no more idea of imposing physical examinations at that time than we had previously. As a matter of fact, the current agreement had been in effect for over fourteen years when the company decided to impose physical examinations. In this connection, it is only pertinent to add that the requirement is not being protested by any other group of employes or their organizations on the property.

Inquiry of the St. Louis-East St. Louis lines indicates that it is general practice to require physical examination of applicants for shop craft positions and quite a number require examination of furloughed employes after specified lengths of time. Incidentally, our requirements for furloughed employes are applicable only after they have been out of service in excess of one year, and they are not subjected to the same examination as new employes. The main purpose is for historical record, and such employes are not disqualified because of defects previously acquired in the service of the company and in all cases proper allowances are made for deficiencies in record as to vision and hearing due to advanced age from the date of first or initial examination.

Our decision to require physical examination of all classes of employes was due to the passage of Occupational Diseases Acts and similar legislation. Aside from our inherent right to prescribe terms under which applicants may enter the service, we feel it our duty to properly protect the company's interests by seeing that prospective applicants are devoid of physical defects and free from disease. As to the latter, we are likewise protecting the interests of the vast majority of the employes.

In conclusion we submit:

First, that it is a managerial prerogative to set up the requirements of employment.

Second, that the rule in our agreement covering applicants for shop craft positions does not restrict our rights in the premises.

Third, that the company and the employes are entitled to protection from contagious diseases. Under the Occupational Diseases Acts we are required to protect the employes in service, and should certainly be permitted to protect ourselves against the employment of men already affected.

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.

In the absence of a rule in the agreement in force the employer has the right to require physical examination in this case at the time of initial employment.

That the action of the carrier in requiring the recalled furloughed employes in this case to undergo a physical examination before being permitted to resume work is without justification in the absence of a rule of the agreement in force.

The prior decisions of this Division are consonant with this position.

AWARD

Claim denied insofar as applicants for initial employment are concerned and sustained insofar as it refers to furloughed employes.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 3rd Day of August, 1939.