Award No. 481
Docket No. 457
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 Rules 46 and 22 of the current New York Central Shop Crafts' Agreement. That E. F. Holstein should be compensated for time held out of service by management from August 17, 1938, to the time permitted to return to service.

JOINT STATEMENT OF FACTS: E. F. Holstein entered the service of the railroad company on May 5, 1925, as sheet metal worker (plumber) Mohawk Division, maintenance of way department, at Albany, N. Y. He continued working in that capacity until November 14, 1935, when he laid off upon advice from his attending physician, Dr. T. W. Phelan.

In March, 1937, Holstein applied to the supervisor of bridges and buildings to return to service, and at the request of the management, submitted to physical examinations by Dr. Dickinson, company surgeon at Albany, N. Y., on April 9, 1937, and Dr. Coley, chief surgeon at New York, on May 11, 1937.

On August 17, 1938, P. H. Cox, local chairman of the Sheet Metal Workers' International Association at Albany, N. Y., advised the division engineer that Holstein was ready to return to the service.

On August 29, 1938, the division engineer wrote Mr. Cox, requesting that Mr. Holstein report to the railroad company's chief surgeon in New York City for physical re-examination. On September 3, Mr. Cox verbally protested the request of management. On September 15, 1938, the division engineer again wrote Mr. Cox on the subject, and Mr. Cox again protested.

Holstein has been out of service for almost three years.

POSITION OF EMPLOYES: The employes contend that Mr. Holstein complied with Rule 46 upon his original date of entering the service of the New York Central Railroad; otherwise, he would not have been permitted to enter the service. Rule 46 reads:

> "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

ance of Addendum No. 6 to Decision No. 222," in which decision the Board had promulgated a substitute for National Agreement Rule 46.

Fourthly—The Board signaficantly stated in the last paragraph of the decision that:

"This decision is on a dispute involving the alleged mis-application of Rule 46 of the National Agreement and is not to be construed as an interpretation of any rule subsequently issued."

Award No. 16 of your Board involved a case which is in no way comparable because:

First— It also involved a rule identical with National Agreement Rule 46.

Secondly—It involved the inauguration of "a general program of physical examinations for all employes over 65 years of age."

While the employes are basing their claim in part on Rule 46, it is the management's position that that rule is not involved. In the last analysis, this is a simple case of management's taking proper precautions for the protection of its employes. Rule 46 was never intended to bar the taking of precautionary measures, as in this instance. In fact, there is nothing in the rules which deals with circumstances such as these.

In the instant case, the management merely was following what its considers to be a necessary procedure in order to carry out its responsibility for safe operation, to have the benefit of the advice of its doctors where serious disabilities are apparent. Restrictions upon such rights where disabilities of a serious character are apparent would be a serious handicap in protecting its responsibility for safe operation.

It also is to the employes' personal benefit that every precaution be taken to safeguard their interests and prevent accidents resulting from impaired physical conditions. The management cannot assume its responsibility for safe operation on the basis of the belief of an outside physician, particularly where its own doctors have expressed opinions that, in all probability, the condition would not be affected much by treatment, but must insist upon the right to have its own physicians make these examinations in accordance with its long-established practice. In the instant case, the management did not rely upon the report of its local doctor alone, but had Holstein examined by its chief surgeon, who confirmed the local doctor's findings, and also obtained the views of its medical director. The opinions of all three express uncertainty regarding treatment ever effecting a cure.

Under the circumstances of this case, particularly the character and duration of the illness, the findings and opinions of physicians regarding Holstein's condition, etc., your Board will recognize that, in requesting an examination upon the advice of its physicians, the action of the management 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 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 whch 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 in 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 of his own accord, upon the advice of his attending physician, laid off commencing November 14, 1935. In March, 1937, he made application to return to service, and at the request of the management submitted to physical examinations by company surgeons. They reported to the management adversely concerning his condition, finding a heart ailment which they considered disqualified him for service.

It appears that in August, 1938, he advised his superior that he was ready to return to work and that officer thereupon requested that he report to the company's chief surgeon for physical re-examination. The local chairman protested the request and he has continued to refuse to submit to such re-examination. In his application in August, 1938, he submitted a certificate from his own physician who had been attending him throughout to the effect that he had a slightly enlarged heart with no decompensation and a moderate hypertension, and that it was the opinion of this physician that he was able to do moderately heavy work.

From what was said in the general part of this opinion, there is no question but what the carrier does not have the right to generally or arbitrarily require physical re-examination of this type of employe. However, as was further stated, where circumstances have arisen which make it evident to the carrier that a man's condition has decidedly changed from that at 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. Had he acquiesced in the carrier's request in August, 1938, and company physicians found the same as his own, he should have been returned to work. In this connection, Rule 23 should be noted which provides that employes who have given long and faithful service and have become unable to handle heavy work to advantage, will, if under the pension age, be given such light work available as they can perform in their craft. It may be that the condition that would have developed from such re-examination would bring into play this particular rule. The main hazard seems to be in danger of overexertion. Should the company doctors and the man's disagree concerning his condition, this case would then have presented an instance such as illustrated in the opinion where an independent physician's advice should be taken by both sides.

We cannot allow the claim as made for compensation for time held out of service subsequent to August 17, 1938. We do hold, as above indicated, that there is no general right of physical re-examination under this schedule. We consider the case should be remanded if the party desires to return to work, with permission to the carrier to physically re-examine him bearing in mind the provisions of Rule 23, and if the company physicians still report adversely, the matter should be handled by reference to an independent physician.

AWARD

Case remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

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