Award No. 542

Docket No. 513

2-NYS&W-BM-'41

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William E. Helander when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (BOILERMAKERS)

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Rule 17 (c), General Rules of the Shop Crafts' Agreement, also known as Rules and Rates of Pay for Mechanical Department Employes, and Award No. 368, Docket No. 350, rendered on the 3rd day of August, 1939, by the Second Division of the National Railroad Adjustment Board, be lived up to by the New York, Susquehanna and Western Railroad Company, together with the Erie Railroad Company; and that Otto Chermark be paid for the day he was called to report and sent to the company doctor for compulsory physical examination, and that compulsory physical examination among mechanical department employes be discontinued.

EMPLOYES' STATEMENT OF FACTS: Otto Chermark, boilermaker at the Little Ferry Roundhouse, New York, Susquehanna and Western Railroad, with seniority as of November 24, 1926, was laid off at Little Ferry when the majority of the work was transferred to the Seacaucus Roundhouse (Erie Railroad) in 1935.

Mr. Chermark started work at Seacaucus Roundhouse on April 16, 1935, as boilermaker, and worked in this capacity at both Seacaucus and Little Ferry at various intervals until he was furloughed on March 31, 1939.

One of the regular boilermakers at Little Ferry asked to be absent from October 22 to October 27, inclusive, and Mr. Chermark was notified through his brother who is employed at Little Ferry in regard to this. Mr. Chermark reported to General Foreman M. Bush on October 16, 1939, and made arrangements to cover the period while the regular man was absent. He was given forms 5415 and 2198 and instructed to be examined by Erie company physician. He was examined on October 18, started work on the 22nd and was laid off on the 27th; the regular man returning to work on October 28, 1939.

POSITION OF EMPLOYES: Rule 17 (c) of the Shop Crafts' Agreement, also known as the Rules and Rates of Pay for the Mechanical Department Employes, as of May 1, 1929, reads as follows:

> "(c) When forces are restored senior employes, who were laid off, will be given preference in returning to the service, if available

Otto Chermark, Boilermaker at Little Ferry, N. J. Roundhouse, with seniority as of November 24, 1926 was laid off at Little Ferry when the majority of the work was transferred to the Secaucus Roundhouse in 1935.

Mr. Chermark started work at Secaucus Roundhouse on April 16, 1938, as boilermaker, and worked in this capacity at both Secaucus and Little Ferry at various intervals until he was furloughed on March 31, 1939.

One of the regular boilermakers at Little Ferry requested to be absent from October 22 to October 27, 1939, inclusive, and Mr. Chermark was notified of the vacancy. He reported to general foreman at Little Ferry October 16, 1939, made arrangements to cover the period of temporary vacancy and was instructed, as per standing instructions, to appear before company physician for physical examination before resuming work on the temporary vacancy. He was examined on October 18, 1939, started to cover the temporary vacancy on October 22, 1939, and was laid off on October 27, 1939; the regular man returning to work on October 28, 1939.

Rule 17 (c) of the Rules and Rates of Pay for Mechanical Department Employes reads as follows:

> "When forces are restored senior employes, who were laid off, will be given preference in returning to the service, if available within a reasonable time, and shall be returned to their former positions, if possible; regular hours to be reestablished prior to any additional increase in force."

The statement of fact clearly indicates that Mr. Chermark was given an opportunity to work in place of a boilermaker at Little Ferry Shop who desired to be absent for a period of five (5) days. This does not constitute a restoration of forces. The contention of the carrier is that in view of this there could be no failure to live up to Rule 17 (c) of the above mentioned agreement. The carrier further contends that in view of the fact that Mr. Chermark did not lose any time in connection with the physical examination, Award No. 368, Docket No. 350, rendered on the 3rd day of August, 1939, cannot be considered a parallel case and, therefore, any claim of a failure to live up to this award cannot be considered.

It is, therefore, asked that the claim be denied.

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 apply to the following dockets:

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The question here is over the claimed right of the carrier to require physical examinations after employment.

There is no provision in this agreement providing for re-examination of these employes. Moreover, there is nothing in the record or in the history of the controversy between the employes and the carrier on this question

that would indicate that the employes were ever willing that such a practice be adopted.

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.

Where a serious accident has occurred, or a serious illness experienced, such as to make it apparent to anyone that the man's condition has so changed as to make it probable that his retention or resumption of work would constitute a serious hazard, it is but reasonable to assume that the carrier has the right to protect itself and fellow employes.

This does not give the right to the carrier to insist on an examination before returning to service of a furloughed employe or an employe on leave of absence without some other reason as stated in this opinion.

The carrier was not justified in requiring the employe to submit to examination in this case.

The employe will be compensated for time lost.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 22nd day of January, 1941.