Award No. 543
Docket No. 523
2-Erie-SM-'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. (SHEET METAL WORKERS)

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Rule 17 (c) in Rules and Rates of Pay for Mechanical Department Employes, also Award No. 368, Docket No. 350, of the Second Division, National Railroad Adjustment Board, have been violated by the Erie Railroad Company due to the action of said company instructing George J. Glenfield to report to the company physician for a physical examination before being employed at the Secaucus roundhouse as a pipefitter helper.

EMPLOYES' STATEMENT OF FACTS: George J. Glenfield, furloughed pipefitter in the Jersey City Car Department was last employed as a car cleaner, from which position he was laid off on May 20, 1937. Mr. Glenfield reported to General Foreman C. F. Schwartz on January 10, 1940, for the position as pipefitter helper. He was instructed to report to Dr. J. F. Moriarity, company physician, for physical examination and was given Forms 5415 and 2198. He was qualified by the company physician and commenced work at Secaucus Roundhouse on January 10, 1940.

POSITION OF EMPLOYES: That Mr. George J. Glenfield was examined by a doctor before entering the service of the Erie Railroad as a pipefitter apprentice on November 13, 1929; he served his apprenticeship and became a pipefitter on March 30, 1934; he was furloughed on March 31, 1934. He has been continued on the roster in the car department as of March 30, 1933. He was called back to the service several times on different jobs and in different departments. He was last employed in the car department as a car cleaner from which position he was laid off on May 20, 1937.

Mr. Glenfield took his physical examination under protest.

That the action of the management in sending Mr. Glenfield to the doctor for a physical examination is a violation of Rule 17 (c) which reads: "When forces are restored senior employes, who are 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."

It is also our contention that this is a violation of Award No. 368, Docket No. 350 of the Second Division, National Railroad Adjustment Board which is as follows:

> "Claim of Employes: That the practice of compulsory physical examination among the mechanical department employes be discontinued.

and the Heads of Departments will, therefore, determine and require the necessary examinations before permitting employes to return to service."

These employment rules were effective prior to any rules negotiated for mechanical department employes, the original of which was dated January 4, 1923. These rules covering employment are substantially the same as the operating rules, safety rules, or other regulations that are established by the railroad company for the operation and maintenance of the railroad and facilities. When the Rules and Rates of Pay for Mechanical Department Employes, which became effective January 4, 1923, were in the process of negotiations, the employes submitted for consideration Rule 46 of the so-called National Agreement and proposed that the rule be made effective on the Erie Railroad. Vice President W. A. Baldwin, representing the railroad company, declined to incorporate any rule that would restrict and limit the right of the railroad company to determine physical or educational qualifications of employes.

Accordingly the matter was disposed of and the rules and rates of pay accepted by the employes without incorporating such a rule.

Some references have been made to Decision No. 1362 by the United States Railroad Labor Board, dated at Chicago, Ill. November 13, 1922. We do not understand just what relation this decision by the Labor Board would have to the type of case that is involved in this submission, because the Board definitely says "This decision is on a dispute involving the alleged misapplication of Rule 46 of the National Agreement and is not to be construed as an interpretation of any rule subsequently issued."

It is obvious that any effect this decision might have would be dependent entirely on whether or not Rule 46 was continued in subsequent agreements and as the employes' proposal was amended by withdrawing this rule, obviously the decision would not have any effect.

We feel that in requiring a physical re-examination of George J. Glenfield on January 9, 1940 the railroad company was within its rights, and that there was no violation of any rule and the claim should be declined by your board for the following reasons:

1. George J. Glenfield, Pipefitter, held no seniority rights as a pipefitter helper at Secaucus, N. J. and therefore Rule 17 (c) was not involved.

2. Award No. 368, Docket No. 350, Second Division, National Railroad Adjustment Board, is applicable only to the facts and circumstances existing on which that particular award was based and would have no bearing on any other case.

3. Regardless of statements now made by the general chairmen of the various committees, physical re-examinations had been recognized and accepted, and on numerous occasions employes have been called upon to take physical re-examinations as a result of request received by the chief surgeon from local chairmen and/or general chairmen.

4. In support of such action there is submitted Exhibit B, a copy of a report issued by Mr. John A. Marvin, secretary-treasurer of the Federated Shop Crafts Committee, which report was submitted after a conference between the general chairmen and the chief surgeon at Cleveland, Ohio, on November 17, 1936, and your attention is directed to the fact that it was agreed "that the final disposition of these cases should be left to the Chief Surgeon instead of the local medical examiner."

5. The requiring of physical re-examinations under the employment rules is the same for all classes of employes and there is no justification or support for a position which would establish mechanical department employes on a different basis than other employes for the purpose of employment rules.

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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513	532	538
523	533	539
527	534	555
		556

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 qustion 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 an examination in this case.

The record in this case shows that the employe lost no time from work in the taking of the examination in this case.

AWARD

Claim in respect to physical examination 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.