Award No. 1185
Docket No. 1112
2-SP(PL)-MA-'47

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (MACHINISTS)

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE: CLAIM OF EMPLOYES: That Machinist Arthur G. Stephens' service rights were unjustly terminated at Albany, Oregon, and that accordingly the carrier be ordered to reinstate him in the service with pay for all time lost since April 11, 1946.

EMPLOYES' STATEMENT OF FACTS: The carrier employed Arthur G. Stephens, hereinafter referred to as the claimant, as a fully qualified machinist at Albany, Oregon, on February 11, 1946.

This claimant entered the service on the 7 A. M. to 3 P. M. shift on February 11, and remained therein continuously until the end of the 7 A. M. to 3 P. M. shift on April 11, 1946. During this period the claimant worked 60 eight-hour shifts without any complaint having been registered against his qualification or competency as a machinist.

At about 3 P. M. on April 11, this claimant received notice dated April 6th, from Mr. Hopkins, superintendent of the Portland Division, that his services had been disapproved. This is affirmed by the copy submitted of notice the claimant received, identified as Exhibit 1.

This dispute has been handled with the carrier in accordance with the provisions of the controlling agreement, with the result that the highest designated carrier officer to whom such disputes are subject to appeal has declined to adjust said dispute, or submit it jointly to this Division for determination. This is substantiated by the copies of letters submitted, identified as Exhibits 2 and 3, dated respectively September 12 and 14, 1946.

POSITION OF EMPLOYES: It is submitted that this claimant, by virtue of the service rendered, disclosed in the foregoing statement of facts, established employment relations with the carrier and property-seniority rights as a machinist on February 11, 1946, within the explicit provisions contained in Rule 31, captioned, "Seniority—When Begins," which in part reads:

> "* * * seniority in the class of a craft begins at the time the employe's pay starts."

It will be noted from reading this rule that, when the seniority of a machinist begins, as in the case of this claimant, it is not conditioned upon

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.

At the hearing of this case before the referee both sides agreed that the question of competency was not at issue as the employe had remained in service sixty (60) days in accordance with Rule 40. Prior to this understanding there had been a difference between the parties as to whether the employe was in service fifty-eight (58) days, fifty-nine (59) days, or worked sixty (60) shifts, etc.

Rule 39 of the working agreement provides, in part, that: "No employe shall be disciplined or dismissed without a fair hearing by the proper officer of the company * * *," and then goes on as to procedure regarding precise charge, etc.

It is the position of the carrier that Stephens was not an employe entitled to the benefits of the so-called hearing and investigation rule, but that in line with understandings had when he signed an application for employment, he was in the status of a temporary or probationary employe until his application for employment was approved or disapproved.

It developed during the hearing that it was the practice of management to notify what they term temporary or probationary employes when their applications were disapproved; however, there was no practice of notifying such employes when their applications were approved.

It is clear that under the procedure now in effect on this railroad an employe might be in the temporary or probationary status for an indefinite period, as there is no rule in the agreement providing for a time limit in which applicants for employment may have their application approved or disapproved.

It is also found that a few years ago the parties had attempted to negotiate a time limit for the approval or disapproval of applicants, but that their negotiations did not come to a successful conclusion.

The foregoing would indicate that there must have been some doubt in the carrier's mind as to the validity of their application form; that is, their right under various conditions or circumstances to terminate services at their option and without agreement with representatives of the majority of the craft or class of the employes involved even though the individual had signed an agreement, or had an understanding that his services under certain conditions might be terminated.

In the application for employment that Mr. Stephens signed he answered "yes" to a question propounded and which reads as follows:

> "Do you understand that if you enter the service it will be on probation, and that you cannot be considered an accepted employe, unless the company obtains satisfactory references and determines that in addition to your mastering the details of any job with which you may be intrusted, you possess the qualities honesty, loyalty, reliability, carefulness, courtesy and the ability to get along pleasantly with fellow-workers?"

Mr. Stephens also answered "yes" to a question propounded as follows:

> "Do you understand that employment meantime is temporary and may be terminated by the company at its option, in which

event you agree to be removed from service at once without complaint, and will not ask for or expect to be informed of the nature or source of replies to inquiries regarding your previous record?" An applicant could be rejected by management for:

1. Unsatisfactory references.
2. Not mastering details of job.
3. Dishonesty.
4. Disloyalty.
5. Unreliability.
6. Carelessness.
7. Discourtesy.
8. Inability to get along pleasantly with his fellow-workers.

Here are eight reasons as covered in application of employment for terminating employment at the determination of the company—no charges to be made, no reasons to be given—even though the applicant authorizes his previous employers to answer inquiry as to his cause for leaving, he is prevented in the same application from "asking or expecting to be informed of the nature or source of replies to inquiry regarding his previous record."

There is a rule in the working agreement—Rule 44—which provides applicants for employment may be required to take physical examination at the expense of the company to determine their fitness to perform services required in their craft or class; and that they may also be required to make a statement showing addresses of their relatives; necessary four years' experience, and names and addresses of last employers.

Nothing is found in the working agreement with reference to temporary or probationary employes, nor is there found any provision for such employes under the term employe as defined in the Railway Labor Act or as referred to in the orders of the Interstate Commerce Commission; therefore, this Division must find that in this case it is handling a dispute growing out of a grievance between an employe and his representatives and carrier and their representatives.

Employes cannot be required to sign away on an application for employment, or an individual contract, rights that may be obtained for them in the collective bargaining agreement under which they work, i.e., the agreement covering rates of pay, rules and working conditions negotiated between representatives of the craft or class of employes and the carrier.

If an applicant or an employe for example signs an individual agreement or employment contract that he would work for the carrier for rates of pay less than those specified in the agreement, he could, if working under the agreement, claim the pay specified therein; so an employe might individually agree that he could be dismissed at any time; yet, if an agreement rule provided that the employe could not be dismissed without a hearing the working agreement applicable to all employes would supersede the individual contract or agreement. This must be and is true in collective bargaining or majority rule.

This Division does not pass judgment on Stephens' qualifications, or any of the other qualities referred to in the application for employment. The Division does not know why Stephens' services were terminated—no reason has been given. We find that as an employe he should have been given a hearing under Rule 39.

AWARD

That Machinist Arthur G. Stephens' service rights were unjustly terminated at Albany, Oregon, and that accordingly the carrier is ordered to reinstate him in the service with pay for all time lost since April 11, 1946, less any amount that Mr. Stephens may have earned in other employment during the period mentioned.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 13th day of May, 1947.