Award No. 1462
Docket No. 1392
. 2-IT-CM- '51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in additional Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 154, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

ILLINOIS TERMINAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That the carrier be ordered to discontinue the physical re-examination of employes being restored to service after having been furloughed or out of service for a period of six months or more.

EMPLOYES' STATEMENT OF FACTS: The carrier recalled to service three furloughed carmen helpers at Federal, Illinois. Carman Helper W. L. Kolk, with seniority date of 4-2-48, was told to report to Dr. McGuinnes at Alton, Illinois, to take a physical re-examination and if accepted, to report for work August 16, 1950. He passed the re-examination and went to work on August 16, 1950.

Carman Helper James Fitchenal, with seniority date of 7-2-48, was told to report to Dr. McGuinnes at Alton, Illinois, to take a physical re-examination and if accepted, to report for work August 18, 1950. He passed the re-examination and went to work on August 18, 1950.

Carman Helper E. E. Clark with seniority date of 9-15-48, was told to report to Dr. McGuinnes at Alton, Illinois, to take a physical re-examination and if accepted, to report for work August 18, 1950. He passed the re-examination and went to work on August 18, 1950.

To the best of the employes knowledge this is the first time employes on furlough when recalled to work for the carrier were ever required to take a physical re-examination.

POSITION OF EMPLOYES: The carrier, on or around January 1, 1950, sent to general chairmen of all organizations holding agreements with the carrier a copy of agreement which the carrier made with the Missouri Pacific Hospital Association of St. Louis, Missouri and this agreement covered the cost of the various services performed by the association for the carrier. Among the costs mentioned were those charged the carrier for the re-examination of employes after being furloughed or out of service six months or longer. Some of the organizations have agreements with the carrier that provide for the physical re-examination of employes whom they represent. The carrier contends that this circular letter sent to the

seven general chairmen of System Federation 154 constitutes a notice of their intention to change their long established practice as far as the shop crafts were concerned.

Rule 43 of the agreement does not provide for a physical re-examination of employes and reads as follows:

> "Applicants for employment shall fill out necessary application blanks and will be required to take physical examination, and employment will be considered temporary until application has been approved. The application shall be approved or disapproved within thirty (30) days after applicant begins work."

The applications of Carmen Helpers W. L. Kolk, James Fitchenal and E. E. Clark were approved, as they worked much longer than thirty days before they were furloughed.

The employes in support of their position that there is no agreement or understanding, written or verbal, that would permit the carrier to give employes who had been furloughed or out of service six months or longer a physical re-examination before being permitted to return to work, list as Exhibits A-B-C letters from Mr. F. L. Dennis, general manager of the Illinois Terminal Railroad.

CARRIER'S STATEMENT OF FACTS: Rule 13, page 2, of "RULES Governing Physical Examinations, Including Eyesight, Color Sense and Hearing with Method of Conduction", effective January 1, 1950, copy of which is submitted herewith, provides that employes returning to service after an absence of six (6) months or more will be subject to a physical examination. This rule has been followed in all crafts, including the carmen, since the effective date and without question, except from the carmen's organization. The only mention made of physical examination in the agreement between the Illinois Terminal Railroad Company and its employes of the mechanical department, represented by System Federation No. 154, is Rule 43, reading as follows:

"APPLICANTS FOR EMPLOYMENT

> Applicants for employment shall fill out necessary application blanks and will be required to take physical examination, and employment will be considered temporary until application has been approved. The application shall be approved or disapproved within thirty (30) days after applicant begins work."

POSITION OF CARRIER: It is the position of the carrier that it is not in violation of its agreement with System Federation No. 154 as this agreement does not prohibit physical examinations in any manner. The carrier believes it is within its rights in protecting itself against injuries and disabilities which employes may incur while not performing service for the railroad and it is a well known fact that many employes who are furloughed do accept temporary employment where injuries such as hernias, etc., may occur. Carrier does not take the position that any employe represented by System Federation No. 154 may be discharged from service because of such physical re-examination without a full and complete investigation as provided in the agreement. Further, the carrier has offered to compensate employes for any time lost while taking such physical re-examinations. It is, of course, understood that the carrier pays for the examinations. We believe this practice to be fair, both to the company and to the employes, and trust that the Board will so find.

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.

The carrier recalled to service three furloughed carmen helpers in August, 1950. They were required to take physical examinations before reporting for service. All three were accepted and placed in service. It is contended, however, that these employes were entitled to be recalled for service under terms of the existing agreement without taking physical re-examination.

The record shows that on January 1, 1950, the carrier unilaterally adopted "Rules Governing Physical Examinations, Including Eyesight, Color Sense and Hearing with Method of Conduction" which included a section providing that employes returning to service after an absence of six months or more will be subject to a physical examination. It is the contention of the Organization that this rule violates its current agreement with the Carrier and it requests the Division to so declare. While it is true that the three carmen helpers were accepted and placed in service, and consequently have suffered no financial loss, a declaratory award which has for its purpose the settlement of a dispute at its inception is within the purview of the Railway Labor Act. No better way exists "to avoid any interruption to commerce or to the operation of any carrier engaged therein."

The question concerning the physical examination of employes in the railroad industry after employment has been one of almost continuous duration. The public as well as management and employes are directly interested, particularly among the operating crafts.

At the outset, we point out that it was the prerogative of management to make any and all decisions connected with the operation of the railroad prior to the advent of the collective agreement. This necessarily meant that carrier could employe or discharge whom it would for any reason that it cared to assert. These prerogatives of management are now limited by the agreements which it has made, leaving in the hands of management such authority as has not been eliminated or limited by contract. The carrier here asserts that the right of a carrier to reexamine an employe's physical condition after his initial employment is a part of the residuary authority remaining in its hands which has not been divested by any agreement provision. If this be so, the right of the carrier to reexamine the physical condition of an employe at any time or place could not be denied.

It is provided by Rule 43 of the agreement that applicants for employment shall fill out the necessary application blanks and will be required to take a physical examination. The application shall be approved or disapproved within 30 days. If the employe works 30 days, or more, without a disapproval of his application, he becomes an employe of the carrier and is entitled to the benefits of the existing agreement and assumes the responsibilities that it imposes. When a force reduction is necessary, he is subject to furlough in the inverse order of his seniority. He retains rights under the agreement, however, and when additional men are required, he is entitled to be called for service in order of his seniority. This is a valuable right under the agreement. The agreement does not provide that he shall be called back if, and only if, he can pass a physical examination. It provides that he shall be returned to service in order of seniority. The question then is: May the carrier unilaterally invoke rules which provide additional conditions upon his recall to service? We think not. To do so is, in effect, a rewriting of the agreement and a rule which requires a physical examination of a furloughed employe who has been out of service six months or more, changes his basic contract right to a recall to service. It imposes conditions which the collective agreement did not include. Many of the awards of the Division point to this conclusion. We cite a few: See Awards 483, 544, 721, 1134, and 1310.

This does not mean that an employe who has been out of service six months or more may not be reexamined in the same manner and under such circumstances as an employe who has been in the continuous service of the carrier.

Their status as regards physical examinations are identical. In this respect the rule is that where circumstances have arisen which make it evident that an employe's condition has decidedly changed from what it was at the time of his entrance into the service to the extent that such condition may be hazardous to other employes, or the public, or detrimental to the efficient operation of the railroad, the right of the carrier to reexamine such an employe before assuming further risks growing out of his physical condition cannot be successfully questioned. See Awards 1134, 1288, 1397, and 1419.

We must conclude, therefore, that the general rule adopted by the carrier that all employes restored to service who have been furloughed six months or more are subject to physical examination, is in violation of the current agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July, 1951.