Award No. 1589
Docket No. 1508
2-ACL-CM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement Carman B. M. Thomas was unjustly suspended from the service from January 18 to January 30, 1951, inclusive, and that accordingly the carrier be ordered to compensate this employe for all of said time lost.

EMPLOYES' STATEMENT OF FACTS: The carrier employed B. M. Thomas, hereinafter referred to as the claimant, at Waycross, Georgia, as a car repair helper, effective January 3, 1951, and the next day moved him up in rank to the classification and pay of a carman. However, this claimant, as an applicant, was first examined and approved for service by the carrier's Medical Department. The claimant thus continued in the service daily as a carman until the conclusion of his day's work on January 17 when he was removed from the service on advice of shop superintendent, orally conveyed to him by the car foreman. Nevertheless, the carrier made the election to restore this claimant to service on January 31, 1951, and he remained therein until about one hundred carmen, including helpers and apprentices, were furloughed early in September.

The carrier removed or suspended this claimant from the service without affording him any hearing and neither was the local chairman of the carmen given any advice of the change made in the force of carmen on January 17, 1951.

This dispute for the time lost in favor of the claimant was filed with the shop superintendent on February 6, 1951, and progressed in conformity with the current agreement (Effective November 11, 1940, with Revisions and Supplements Effective as Shown. Reprinted March, 1950) up to and including the highest designated carrier officer to handle such disputes, who declined on September 20 to pay the claimant for the time lost.

POSITION OF EMPLOYES: It is submitted, on the basis of the foregoing factual statement, that the claimant's employment by the carrier constitutes an indisputable fact that he not only fully complied with the requirements of Rule 29 of the aforementioned current agreement but that he

Mr. Thomas, through his physician, Dr. Seaman, had the glucose tolerance test made on January 25, 1950, with the following results:

	Blood Sugar	Urine Sugar
Fast	145	Neg.
½ Hr.	205	Neg.
1 Hr.	195	Neg.
2 Hr.	173	Neg.
3 Hr.	126	Neg.
4 Hr.	118	Neg.

With the additional information obtained from this test, which is considered the best conclusive proof known to medical science at this time, our chief surgeon was convinced that Mr. Thomas was not the diabetic the laboratory test had previously indicated, and immediately approved him for service.

Your Board in Award 866 has ruled that the discipline rule—Rule 21 in this instance—"relates to discipline, suspension or discharge for some act of the employe after entering the service of the carrier. This rule does not extend or purport to extend to an investigation of the qualifications of an applicant for employment." There is not now and never has been any question as to the facts surrounding Mr. Thomas' release during the period his physical condition was being checked. In pursuing the course he did, our chief surgeon was not only assuming his responsibility to the carrier but was safe-guarding the life of Mr. Thomas and his fellow employes, which they, whether they admit it or not, rightfully expected.

The carrier's interest in the claimant's health and its handling of his application for employment and the indicated diabetical condition cannot by any stretch of the imagination be construed as applying discipline, and we believe your Board will so rule.

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.

B. M. Thomas, claimant in this case, applied for employment with carrier as car repairer helper at Waycross, Georgia, on December 26, 1950. Above his signature on the application Form 127 was the following statement:

> "I hereby agree that my employment is temporary until this application is approved as to references given and has been accepted by the Chief Surgeon."

Thomas was given a physical examination by the carrier's local medical examiner on the above date, specimens of blood and urine were sent to the local laboratory, and reports thereon were sent to the Chief Surgeon's office

at Wilmington, North Carolina. Pending action by the latter, Thomas was allowed to begin work on January 3, 1951. On January 15, 1951, the Chief Surgeon, observing that the urinalysis had shown plus 4 sugar, suggesting the possibility of a dangerous diabetic condition, issued a disapproval of Thomas' employment. Thereupon on January 17, the shop superintendent at Waycross orally informed Thomas that the carrier was dispensing with his services. It appears that the reason for this action was not then conveyed to Thomas.

The organization, upon taking up the case, discovered the reason by communicating with the Chief Surgeon. Thereafter, on January 25, Thomas had himself examined at the Ware County Hospital, where more definitive tests revealed him free of diabetes. Upon learning of these results the carrier re-employed him on January 30, 1951, after he had lost nine working days as a carman, to which position he had been moved up on January 4, 1951.

Rule 21 of the parties' controlling agreement contains the usual provisions on disciplinary action by the carrier against an "employe." The first question to be determined here is whether, given the circumstances under which Thomas began work for the carrier, he was an "employe" within the meaning intended by Rule 21. The Railway Labor Act in Section 1, Fifth, defines "employe" as "every person in the service of a carrier (subject to its continuing authority. . .) who performs any work defined as that of an employe. . ." by the Interstate Commerce Commission. It is a reasonable presumption that this definition was the one in the minds of the parties when they used the term "employe" in Rule 21. Under this definition, Thomas was an employe and as such was subject to the provisions of that rule—unless the definition is modified by other law or by other provisions of the parties' agreement.

The Railway Labor Act makes no distinction between "temporary" employes (subject to unilateral dismissal upon failure to fulfill certain specified conditions and not having full rights under a collective bargaining agreement) and "permanent" employes having full rights under the provisions of such an agreement including those on discipline. Nor does the parties' agreement make such a distinction in explicit terms. But portions of that agreement, as well as the common law on employer-employe contracts, do imply some such distinction.

As to the agreement, Rule 29 on employment states that applicants must take necessary examinations. We may infer that the parties intended thereby to reserve explicitly to management the right to reject applicants who fail to pass the examinations set by the carrier. It is further not unreasonable to believe that under this rule the carrier retains its right to use applicants in its service temporarily, pending learning the results of its examinations, and to later relieve them of their duties if they have failed to pass the examination.

Rule 32(c), which states that an employe of 30 days service will not be dismissed for incompentency, also implies the above-mentioned distinction among employes.

As we have stated in our findings on other cases, under the common law a new employe makes with his employer an individual contract of employment which incorporates not only the provisions of any collective bargaining agreement covering his class of employes but also any unilateral rules of the employer which are not in conflict with the law and with the provisions of the collective bargaining agreement. In accepting employment the new employe agrees to be bound by the employer's rules and conditions as well as by the union agreement.

In the instant case, Claimant Thomas agreed to be bound by the above-quoted condition found above his signature on Form 127. And this condition

was validly laid down by the carrier unless it was in conflict with the law or with the collective agreement's terms.

Clearly the condition imposed in Application Form 127 does not violate the common law. Nor are we able to find anything in the Railway Labor Act which prohibits or restricts the carrier's utilization of this condition of employment, so long as it is not used as a device to defeat the new employe's right to join a labor organization and bargain collectively with the carrier. And finally, we do not believe that any provision of the parties' agreement limits or prohibits the carrier's lawful use of the condition.

But these findings do not conclusively determine our disposition of the claim now before us. We think that the individual agreement on temporary employment entered into by the employe and the carrier on Form 127 implies certain obligations that must be borne by the carrier as well as by the employe. It is true that the new employe obligates himself to be bound by the carrier's decision. But it appears equally true that the carrier obligates itself to make reasonable, well-founded decisions. The record shows that the carrier in this case failed to fulfill this obligation. We think that the carrier itself should have applied to Thomas the definitive test for diabetes and should not have acted on an inference from the urine test that later proved wholly incorrect.

The carrier frankly and honestly implied an acceptance of the above-mentioned obligation when, upon learning of the results of the medical examination initiated by Thomas, it reversed its earlier decision and re-employed him.

We rule, then, that although Thomas' case was not one requiring the application of Rule 21 on Discipline Hearings, Thomas was improperly released by the carrier from service during the period mentioned in the claim. And we direct the carrier to compensate Thomas at pro rata rates for the working time he lost during this period. From the total of this amount shall be deducted the total of any wage income earned by him in other employment during such period.

AWARD

Claim sustained as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.

CARRIER MEMBERS DISSENT TO AWARD NO. 1589, DOCKET NO. 1508

Claimant B. M. Thomas, when applying for employment as car repairer helper at Waycross, Ga., on December 26, 1950, made out and signed the standard application blank Form 127, and above his signature on this form was the following statement:

> "I hereby agree that my employment is temporary until this application is approved as to references given and has been accepted by the Chief Surgeon."

The claimant was given a physical examination by the carrier's local medical examiner on December 26, 1950, specimens of blood and urine were sent to the laboratory and reports thereon were sent to the Chief Surgeon's office at Wilmington, N. C., on January 3, 1951; pending action by the Chief Surgeon, Claimant Thomas was allowed to begin work. The Chief Surgeon's findings, from the laboratory tests, were that there were possibilities of a dangerous diabetic condition, accordingly the application of Claimant was disapproved and he was so informed, and his services were discontinued at the close of business on January 17, 1951.

Claimant Thomas had himself examined at the Ware County Hospital, this examination indicated he was free of diabetes: The carrier, upon learning these results, re-employed Thomas on January 31, 1951, he had been out of service a total of nine working days. The majority in the findings state:

> "In the instant case, Claimant Thomas agreed to be bound by the above quoted condition found above his signature on Form 127. And this condition was validly laid down by the carrier unless it was in conflict with the law or with the collective agreement's terms.
>
> Clearly the condition imposed in Application Form 127 does not violate the common law. Nor are we able to find anything in the Railway Labor Act which prohibits or restricts the carrier's utilization of this condition of employment, so long as it is not used as a device to defeat the new employe's right to join a labor organization and bargain collectively with the carrier, and finally, we do not believe that any provision of the parties' agreement limits or prohibits the carrier's lawful use of this condition.
>
> But these findings do not conclusively determine our disposition of the claim now before us. We think that the individual agreement on temporary employment entered into by the employee and the carrier on Form 127 implies certain obligations that must be borne by the carrier as well as by the employes. It is true that the new employee obligates himself to be bound by the carrier's decision. But it appears equally true that the carrier obligates itself to make reasonable, well-founded decisions. The record shows that the carrier in this case failed to fulfill this obligation. We think that the carrier itself should have applied to Thomas the definite test for diabetes and should not have acted on an inference from the urine test that later proved wholly incorrect."

The majority in their findings in this case conclude that there has been no violation of the individual contract (Form 127) nor in the parties' agreement, yet without citing any rule or other references they contend that the carrier failed to fulfill its obligations by not having applied to claimant the definite test for diabetes. When Claimant Thomas' physical examination revealed that he had failed to meet the carrier's requirements the carrier's responsibility ceased.

The individual contract and the parties' agreement were not violated. The fact that the urine test indicated a possibility of a dangerous diabetic condition was sufficient reason for the Chief Surgeon to disapprove the application. The carrier was not obligated to make further test.

It has been universally recognized that the carriers may and have established certain standards not only on character references but for physical condition for applicants for employment: Such standards were in effect on the carrier involved in the instant case. The record is clear that the claimant failed to meet the established standard, but notwithstanding, the majority has completely ignored both the prerogative of the carrier and the physical condition of the claimant.

The views of the majority in the findings in this case are not supported by the rules of the individual contract nor that of the collective bargaining agreement.

C. S. Cannon

J. A. Anderson

D. H. Hicks

R. P. Johnson

M. E. Somerlott