Award No. 3086
Docket No. 2827
2-PRSL-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

PENNSYLVANIA-READING SEASHORE LINES

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement the Carrier is without authority to require employes to undergo periodic physical reexaminations.

2. That, accordingly, the Carrier be ordered to compensate Car Oiler F. A. Goslin in the amount of eight (8) hours at the pro rata rate plus expenses incurred while traveling from his home point, Millville, New Jersey to Camden, New Jersey, and return, in accordance with carrier's instructions.

EMPLOYES' STATEMENT OF FACTS: Franklin A. Goslin, hereinafter referred to as the claimant, is employed by the Pennsylvania-Reading Seashore Line, hereinafter referred to as the carrier, as a car oiler at Millville, New Jersey. The claimant, whose present age is forty-eight (48) years, has been in the service of the carrier since the last date hired, June 23, 1942. The claimant is regularly assigned to the 6:00 A.M. to 2:00 P. M. E. S. T. shift, Tuesday through Saturday, with Sunday and Monday as rest days.

The carrier has ordered the claimant to report to its medical examiner at Camden, New Jersey, at six (6) months intervals, for a physical reexamination. On May 14, 1956, the claimant, in accordance with carrier's instructions, reported to the medical examiner for a physical reexamination. The trip to Camden and return to Millville, together with the time spent in the medical examiner's office, consumed a period of eight (8) hours, for which the carrier refuses to allow the claimant any compensation.

Following the physical reexamination of the claimant he returned to duty on his regular assigned position on Tuesday, May 15, 1956.

decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

* * * * *."

It will be noted that under paragraph 1(a) of Article V, all claims or grievances **must** be presented in writing to the officer of the carrier authorized to receive same, within **60 days** from the date of the occurrence on which the claim or grievance is based. The claim made in behalf of the claimant for expenses allegedly incurred on May 14, 1956, has not been handled by the employes in accordance with Article V of the August 21, 1954 agreement. Therefore, it may not now properly be entertained nor allowed.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties. To grant the claim of the employes in this case would require the Board to disregard the agreement between the parties thereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has shown that the applicable agreement has not been violated in the instant case and that the claimant is not entitled to the compensation which he claims.

It is respectfully submitted, therefore, that the claim in the instant case should 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.

Parties to said dispute were given due notice of hearing thereon.

Claimant, on the orders of the carrier, submitted to a physical examination on his rest day.

He asks compensation for time lost.

Was the agreement violated?

There is no rule in the effective agreement concerning physical examinations of employes.

Regulation 1-A-1 does not apply. It applies to applicants for employment.

The right of the carrier to require physical examinations of employes is established by past practice. This was so in 1941 when the current agreement became effective.

Is the claimant entitled to compensation for time lost? No work or service was performed and there is no rule in the effective agreement requiring the carrier to pay its employes for taking a physical examination. See Award No. 2708 of this Division.

Our only function is to determine if the agreement has been violated.

If this practice of requiring physical examinations is unfair or inequitable it should be corrected by negotiation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 19th day of January, 1959.

DISSENT OF LABOR MEMBERS TO AWARD No. 3086

Examination of the findings discloses that the majority ignored the primary issue entirely; the primary issue being whether under the controlling agreement the carrier has the authority to require employes to undergo **periodic physical reexaminations.**

Naturally there is "no rule in the effective agreement requiring the carrier to pay its employes for taking a physical examination." How could there be since there is no rule in the agreement requiring an employe to take a physical reexamination? It is however an elementary principle of the law of contract, where parties are situated as are these, i. e., employer and employe, that if the employer calls upon the employe to do something the employer thereby creates an implied contract to the effect that if the employe responds he will be paid.

The majority, in stating that the matter of physical examinations should be corrected by negotiation, overlook the fact that physical examinations were the subject of discussion at the time the agreement was negotiated and physical reexamination was not included in the agreement. The agreement was adopted through the medium of fair and open negotiation and decisions of

the Board should be made in the light of the existing agreement in order to avoid any negation of Sec. 2 First of the Railway Labor Act.

The majority makes no distinction between physical examination for employment and physical examination of employes. To hold, as do the instant findings, that the right of the carrier to require physical reexamination of employes is established by past practice is tantamount to creating a new rule providing for physical reexamination of employes. This the Board is without jurisdiction to do since it has no authority to make or amend a rule of an agreement. The Board is bound by the agreement which the parties have made.

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner