Award No. 4612

Docket No. 4543

2-B&OCT-EW-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee P. M. Williams when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 20, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Electrical Workers)

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Baltimore and Ohio Chicago Terminal Railroad Company unjustly removed Electrician John E. Saylor from service.

2. That accordingly the Baltimore and Ohio Chicago Terminal Railroad Company be ordered to return Electrician John E. Saylor to service with all seniority rights unimpaired and compensate for all time lost in accord with the claim dated March 11, 1963.

EMPLOYES' STATEMENT OF FACTS: That John E. Saylor, hereinafter referred to as the claimant was employed by The Baltimore and Ohio Chicago Terminal Company, hereinafter referred to as the carrier, as an electrician on January 21, 1958, he resigned on July 17, 1962. He was rehired as an electrician by the carrier on August 18, 1962, and he worked as such until he reported for work on November 1, 1962, when he was sent by the carrier to their medical examiner for a physical examination. He still continued to work as an electrician after this examination until he reported for work on November 15, 1962, at which time he was told that he did not pass the physical examination and due to this he was sent home.

As a result of this under date of March 11, 1963, a claim was filed.

Under date of March 11, 1963, Foreman Adams denied the claim.

Under date of March 14, 1963, we appealed the decision of Foreman Adams to General Foreman Gross.

In the first instance, the claimant failed to meet the basic height and weight requirements, standards established for that position.

In the second instance, upon x-ray examination of the claimant, it was disclosed that there were congenital abnormalities with changes in the second, third and fourth lumbar vertebrae.

Summarily put, there were substantial reasons from a physical standpoint surrounding the rejection of the claimant's application for employment.

The policy of establishing standards of employment belongs solely to the Carrier:

The establishment of standards of employment and the policies adopted pursuant thereto are matters and prerogatives belonging solely and exclusively to the carrier. This is not a divisible responsibility in any sense or meaning of the word; moreover, it is outside the province or warrant of this Division or any other labor tribunal to decide any question dealing with the carrier's employment standards or policies.

In First Division Award No. 15570 (BRT v. B&O) (Referee Kelliher) it was stated in part as follows:

> "This Division does not have the right to determine the employment policies or standards of the Carrier."

In this Division's Award 1715 (Referee Wenke) it was held in part:

> "We have no right to determine whom the Carrier shall employ and what employment policies or standards it may apply in doing so. Why it may reject an application for employment, in the first instance, is a matter of its own concern. * * *"

It follows therefore that the policy of establishing standards of employment is the sole and exclusive prerogative of the management.

CARRIER'S SUMMARY: The working contract contemplates the status, probationary or otherwise, of an "Applicant for Employment". The working agreement contemplates that an employe must execute an application for employment. The standard employment application form the claimant executed made employment temporary pending approval. The formal approval of the application is a condition precedent to acquiring vested seniority. In this case the claimant's application was rejected in a "reasonable" period of time. There were good and sufficient reasons surrounding the rejection of that application. The policy of establishing standards of employment, physical and otherwise, belongs solely to the carrier and this proposition has been authoritatively upheld by holdings of this labor tribunal.

Based on the above the carrier submits that the claim and request in this case is without merit; the carrier requests that this division so rule, and that the request and claim in this case 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.

The claimant began working for the carrier as an electrician on January 21, 1958. The record contains evidence to the effect that he resigned on July 17, 1962. He returned to work for the carrier as a new electrician employe on August 18, 1962.

On October 11, 1962, at carrier's instruction, the claimant filled out an application for employment form; on November 1, 1962, he was given a physical examination and two weeks afterward was notified that his application for employment was rejected because he had not passed the physical examination.

During the discussion of this claim between the carrier and the employes, the carrier always maintained that it was not necessary for it to give the results of the physical examination in rejecting claimant's application for employment—and the results were not disclosed to the employes. It was not until carrier made its submission to this Board that the employes were given any medical reason for removing claimant from service. The employes object to the medical reference offered by the carrier and which concerns claimant's general physical condition, because such information was not presented to them for being made a part of this dispute. We find that the objection is valid and should be sustained.

This dispute does not involve the carrier's right to have employment application forms filled out, nor to the right of the carrier to have new employe applicants submit to physical examination. This dispute is predicated upon the employes' premise that in the instant case the carrier waived the mentioned rights as to this claimant.

Rule 1 of the applicable Agreement provides as follows:

> "Applicants for employment may be required to take physical examination at the expense of the carrier to determine the fitness of the applicant to reasonably perform the service required in his craft or class. * * **"

Except for a thirty-two (32) day period following his resignation the claimant had, according to the record presented to us, performed the service required in his craft from January 21, 1958 to November 15, 1962. No evidence is submitted to us that tends to indicate that claimant's performance of his work was other than satisfactory.

We are told that oversight caused the delay in having claimant fill out the application form and in having him take the physical examination.

An outline of the procedures used by the carrier in processing employment applications is not made a part of this record; however, we are given evidence

that carrier used a Form W-4, U. S. Treasury, that had been executed by claimant prior to his resignation, as a basis for its withholding Federal Income and Social Security taxes from his earnings.

We believe that the record presented supports a finding that in this instance the acts of the carrier constituted a waiver of the right which it had to require the claimant to take a physical examination following his being re-employed. Therefore, when it dismissed him from service without giving him, or the organiation representing him, the reasons for such dismissal it be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: William B. Jones
Chairman

E. J. McDermott
Vice Chairman

Dated at Chicago, Illinois, this 10th day of December, 1964.