

Award No. 4817
Docket No. 4785
2-SLSW-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 45, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. - C. I. O. (Carmen)
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the rules of the current controlling agreement, together with Memorandum of Agreement of December 13, 1963, Carman R. J. Smith, Dallas, Texas, was unjustly removed from service on March 13, 1964.
2. That accordingly Carrier be ordered to reinstate this employe to service with seniority from the date he entered service and with compensation for all time lost from March 13, 1964.

EMPLOYEES STATEMENT OF FACTS: Carmen R. J. Smith, hereinafter referred to as the Claimant, entered service with the Southern Pacific-Texas and Louisiana Lines at their Dallas, Texas mechanical department facilities known as Miller Yard, July 8, 1959, and held assignment there until February 13, 1960, transferring to Fort Worth on Carman's assignment effective February 14, 1960. As result of consolidation of mechanical department facilities at Dallas, Texas between the St. Louis Southwestern Railway Company, hereinafter referred to as the carrier and the Southern Pacific-Texas and Louisiana Lines, with carrier becoming the operating railroad, effective January 1, 1964. The position of Virgil M. Reid, Jr. a supervisor in the Miller Yard, was abolished, and he placed himself on his mechanic's seniority at Fort Worth on that date, thus displacing the claimant, who on January 14 made application for one of the vacancies for carmen at Dallas. He was instructed to report to Southwest Clinic in Dallas for physical examination by company doctor, and was examined by Dr. Carlos Piocentini. He passed the examination required at that time, was hired, and went to work on January 14, on third shift assignment in Austin Street Yard, working from 11:59 P. M. to 7:59 A. M., Sunday through Thursday, with Friday and Saturday rest days. Claimant continued to work this assignment, and on March 11, 1964 was served notice signed by carrier's clerk stenographer, not a carrier officer, that under new Cotton Belt policy, it would be necessary for him to have back x-ray made on March 12. He complied with the instructions, and on March 13, 1964 was served notice over the signature of General Foreman C. E. Bynum that his application for employment was being disapproved, which was the 60th day since his employment had started. Protest was immediately made by telephone to the

For reasons set forth above, carrier respectfully submits that the claim is not supported by the rules and 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 employees 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 waived right of appearance at hearing thereon.

The following facts are not in dispute: Prior to January 1, 1964, Claimant, Carman R. J. Smith, had held an assignment as a Carman with the Southern Pacific-Texas and Louisiana Lines (who will hereafter for convenience be referred to as Southern Pacific) at Ft. Worth, Texas. On December 13, 1963, a Memorandum of Agreement was entered into between the Southern Pacific and the St. Louis Southwestern Railway Company (the Carrier involved herein) consolidating their separate Mechanical facilities and service at Dallas, Texas, effective January 1, 1964. As a result the position of a Supervisor at Ft. Worth was abolished and the Supervisor placed himself on the Mechanical seniority at Ft. Worth on January 1, 1964, thus displacing the Claimant. Claimant's name was not included in the list of those on the seniority roster to be transferred to Carrier's list at Dallas without having to fill out an employment application or taking a physical examination. On January 13, 1964, the Claimant, R. J. Smith, made an application for one of the vacancies for Carman at Dallas and he was directed to report for a physical examination which he did and went to work on January 14, 1964. Subsequently, and on March 11, 1964, Claimant was served notice that it would be necessary for him to have a back X-ray made. He complied with the instruction and on March 13, 1964, within sixty (60) days of the date he commenced work, he received notice from the General Foreman that his employment application was being disapproved.

It is contended by Petitioner that Claimant was displaced from his Carman assignment at Ft. Worth by reason of the Memorandum Agreement entered into on December 13, 1963, and, as Section 13 of the Memorandum Agreement placed Claimant within the protection of that Agreement together with the Washington Job Protection Agreement of May 1936, Carrier was without any authority to request him to submit to the first physical examination as well as the application for employment procedures. However, Claimant's name did not appear on the Seniority Roster attached to the Memorandum of Agreement. Consequently, any protection which the Claimant might be entitled to under Section 7 of the Washington Agreement would necessarily be a matter between the Claimant and the Southern Pacific and would be a controversy properly referable to the committee provided for in Section 13 of the Washington Agreement. It is not properly before this Board. In so far as this Carrier is concerned, **when Claimant applied for employment with this Carrier his status was the same as any other carman applicant for employment.**

Claimant, in addition, maintains that Carrier violated Rule 41-1(a) of the Agreement which provides: "After entering service no employe will be required to submit himself for physical examination, except as hereinafter provided;" that at the time

Claimant made application for employment, he completed all the physical examination required, passed it and was accepted for employment; that in spite of and in violation of Rule 41-1(a) in March, 1964, a re-examination was ordered and the reason given by Carrier for the disapproval of his application for employment was on account of his physical rating.

In refutation of Petitioner's contention, Carrier cites and relies upon Rule 23 of the Agreement which reads as follows:

"Rule 23

"Application for Employment

"Employment shall be considered temporary for sixty (60) days pending approval or disapproval of application. If the applicant is not notified of the disapproval of application within sixty (60) days from date thereof, application will be considered approved. An employee who has been in the service of the Carrier sixty (60) days shall not be dismissed for incompetency."

Carrier further urges that the request for an X-ray examination to check the condition of applicant's back was a reasonable requirement.

From a reading of the rules involved, it is apparent that Rule 41-1(a) does not reach the probationary period provided for in Rule 23. If it did so it would render Rule 23 ineffective. Rule 41-1(a) applies after an applicant attains his right as employee, not while he is an applicant on probation. Without giving in the notice any reason for disapproval, a simple statement would have been sufficient compliance within the meaning of Rule 23. In disapproving Claimant's application for employment the Carrier was acting within the scope of its Managerial prerogative and there is nothing in the record to indicate that the action of the Carrier was arbitrary or capricious. See First Division Awards 5256, 6175, 10196, 10775 and 12029.

A W A R D

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Charles C. McCarthy
Executive Secretary**

Dated at Chicago, Illinois, this 9th day of March, 1966.