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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6429
Docket No. 6280
2-LV-CM-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 96 Railway Employes' Department A. F. of L. - C. I. O. (Carmen)
(Lehigh Valley Railroad Company

Dispute: Claim of Employes:

1. That the Carrier is violating the provisions of the controlling agreement in ordering furloughed employes on being restored to service to undergo physical examination.

2. That accordingly the carrier be ordered to discontinue the physcial re-examination of employes being restored to service after having been furloughed.

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 waived right of appearance at hearing thereon.

A carman and a carman's helper were required to take physical examinations when recalled from extended furloughs. Both employes had long service with the company prior to their furloughs. The record does not show the length of time that they were on furlough. The record does not show whether or not there was a prior history of illness or accident or that the carrier knew of any illness or accident during the furlough period as to either of the two men.

This case does not claim relief for the employes named. It is used as a basis for the claim that the carrier has no right to insist upon automatic re-examination as a condition of the right to be returned to service upon recall.

The Organization contends that the Agreement does not grant to the carrier the right to insist upon a physical examination automatically before returning to

service an employe recalled from furlough. It is argued further that after the Agreement, effective 1949, there were conferences and correspondence in 1952, to settle this question. The agreement reached in 1952 followed Second Division Award No. 1462. That Award held that the carrier violated the Agreement when it unilaterally adopted a rule requiring physical examination whenever an employe was recalled after being furloughed for six months or more.

In 1952, the Organization's Secretary-Treasurer, at that time, received correspondence from the Chief of Personnel, at that time, stating the following: "---, I am not averse to changing our existing practice with respect to physical re-examinations being required when recalling furloughed men to service to conform generally to the findings in Award 1462 to the extent that such men may be reexamined in the same manner as an employe who has been in continuous service when circumstances have arisen which make it evident that an employe's condition has decidedly changed from what it was at the time of his entry into the service in that such condition may be hazardous to other employes or the public or detrimental to the efficient operation of the railroad. I am so instructing our people, and I presume our file in the matter may now be closed." After another conference on the same subject within a few months in 1952, the Director of Personnel clarified the subject further by writing to the Organization's Secretary the following: "---, and with respect to this question same will be handled in the future on the basis of good and sufficient cause to justify physical examination.", Employe exhibit G, P. 5, 6.

The Carrier has submitted three points in its argument to support its position namely: That the re-examination after a furlough for any length of time (less than 30 days) is in the best interest of the employe, efficient operations, fellow employees and the public; that the application for employment states, "The employment policy of the company requires---including a physical examination which may be repeated from time to time during period of employment at the option of the Company.", Carriers exhibit J; that a period of furlough provides "good and sufficient cause" to justify physical examination, because the carrier, and possibly the employe, does not know if changes in the employe's condition have occurred during the furlough. The carrier also stated that it has followed a practice of requiring such re-examinations but the Organization states that this is a falsehood.

We do not read in the Agreement any authority for the policy adopted by the carrier. The letters written in 1952 to settle this question do not provide authority to require re-examination automatically as a condition for return to service upon recall. We cannot determine that there is an established policy in view of the conflict of the evidence and in the absence of a record of such practice. We do not believe that every furlough automatically provides, "good and sufficient cause," for reexamination. The statement in the employment application should be read to apply to employes while working who show signs of change in their condition, or who by the nature of their work should be tested from time to time, or who have a record of illness or of accidents.

Nevertheless, the carrier is attempting at its own expense to exercise caution which is, as it claims, for the best interest of all concerned. What the carrier

wants to do makes good common sense. It does not, however, have the right to demand reexamination as a condition to return to service upon recall.

On the other hand, because the examination has value, employes recalled from furlough should not refuse to be reexamined. Since the carrier does not have the right to insist upon reexamination before returning the employe to service when recalled from furlough, the carrier does so at its peril. That is to say, if the employe is withheld from service and loses any time while being reexamined, before resuming his work, the carrier may be required to compensate the employe.

In arriving at these conclusions, we have considered the Awards submitted by each of the parties. On behalf of the Organization, they are Second Division Awards No's. 482, 544, 1134, 1310, 1462. On behalf of the carrier, they are Second Division Awards No's. 1038, 1397, 2147, 3086, 4510, 5021, 5312.

The relief requested by the Organization is in the nature of a declaratory ruling from which the parties may receive guidance for the future. Declaratory rulings are such as to require a review of the equities involved and the rights of the parties. This provides the opportunity to do justice to the parties' positions so as to reach an equitable result.

Accordingly, we find as to item No. 1, of the claim, that the carrier may not establish the necessity for reexamination automatically upon recall from furlough as a condition before restoring an employe to service; as to item No. 2, of the claim, we do not order the carrier to discontinue the policy of conducting such examinations at its own expense upon recall from furlough. In cases where the carrier claims, "good and sufficient cause," for the examination on the basis of concrete evidence of a change in the employe's condition during the period of furlough, the Organization has the right to contest such assertion if it has evidence to the contrary.

In any case, if the employe is delayed, after recall, in returning to work which is available because of the time consumed for the examination, a claim may be made for loss of pay, subject to the carrier's defense that the result of the examination has justified its action.

A W A R D

Claim disposed of in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January, 1973.