

Award No. 368

Docket No. 350

2-Erie-MA-'39

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That the practice of compulsory physical examination among the mechanical department employes be discontinued and that Machinist Martin White be restored to his former position at Seacaucus roundhouse, which he held at the time of dismissal by the Erie Railroad Company, and be compensated for all time lost and such expense as incurred by being sent to Cleveland for physical examination.

EMPLOYES' STATEMENT OF FACTS: In July or August, 1921, the Erie Railroad Company issued instructions for compulsory physical examination of all employes in the mechanical department. A short time later, the instructions were modified to all employes not in service prior to January 1, 1918. All of the employes who refused to take this examination were dismissed from service. Approximately twelve hundred men who refused to take the physical examination were dismissed. The case of the dismissed men was taken to the United States Railroad Labor Board and this Board rendered their Decision No. 1362, Dockets 999—1000 and 1259 on November 13, 1922, which reads in part as follows:

"Employes, who, prior to the issuance of Addendum No. 6 to Decision No. 222, were requested to take physical examination, who were in service at the time such request was made and held out of service account of their refusal to take a physical examination, shall be reinstated with full seniority rights and paid for all time lost, less any amount they may have earned in other employment.

Employes, laid off account of reduction in force who prior to the issuance of Addendum No. 6 to Decision No. 222, were notified that forces would be increased and denied reemployment account of their refusal to take physical examination, shall be reinstated with full seniority rights and paid for all time lost, less any amount they may have earned in other employment."

Both of these decisions, rendered by the Federal Board set up to settle such disputes, were against compulsory physical examination.

In the shopmen's strike on the Erie Railroad in 1922, physical examination was one of the issues, and it was agreed at the time of settlement between the representatives of the organizations and the management, that the

White's service, without informing the supervision of the use the committee was going to make of their replies; in other words, they incorporated what they alleged these foremen said in affidavits previously referred to. Naturally, the supervision had no desire to make any statements that were detrimental to an old employee, but they do not recall now exactly what was said to the local committee.

These affidavits, of course, nor any statements made by the local supervision, have any effect on physical qualifications of an employee.

The situation with respect to physical requirements for shop craft employees is no different now than it has been over a period of years. Prior to the establishing of a "special allowance" in about 1928 for superannuated employees, we had no system by which employees were entitled to consideration for an allowance. If their physical condition dictated, they were merely suspended from the service either permanently or until such a time as they qualified themselves to continue on the job. With the Railroad Retirement Act, employees in this classification are in an entirely different status, and the situation is not all all comparable with the situation previously existing.

Under the circumstances, part 2 of the ex parte submission should also be declined for the following reasons:

1. There have been no rules violated in requiring Machinist Martin White to submit to a physical examination.

2. This physical examination is in line with existing practice over a period of years.

3. Machinist Martin White was not dismissed from the service. He was disqualified for all service, and voluntarily resigned and accepted retirement under the Railroad Retirement Act. Had he been able to qualify, he would have again been permitted to resume service. As an example, take the case of Maurice Burke, pipefitter, Susquehanna, Pa., disqualified for all service March 19, 1937, and after a period of eight months, within which he corrected his physical condition, he again was qualified for service and returned to work November 3, 1937.

4. Machinist Martin White on September 30, 1938, relinquished all right to return to the service of the Erie Railroad Company.

5. This committee representing shop employees have on previous occasions requested the management to give consideration to the advisability of retiring all shop employees who are 65 years of age and over, but they were advised that each case must be considered on its merit with the physical condition of an employee the controlling factor.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

That the action of the carrier in requiring compulsory physical examination of the employee in this case is without justification. There is nothing in the record to prove that Machinist White's physical condition was impaired to the extent that he could no longer perform his work.

The prior decisions of this Division are in consonance with this position.

AWARD

Claim in respect to compulsory physical examination sustained.

With regard to claim by employe White for compensation for time lost, it is the opinion of the Division that in view of the fact that White has made application for a pension under the Retirement Act no allowance will be made for time lost except that White be reimbursed for time lost and expense incurred account of travel to Cleveland and that he further be paid for time lost from time he was removed from service until the effective date of his pension. In the circumstances he cannot be restored to his former position.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 3rd Day of August, 1939.