

Award No. 552

Docket No. 555

2-Erie FO-'41

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee William E. Helander when award was rendered.

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Rule 15 (d), Rules of the Firemen and Oilers' Agreement, also known as Rules for Mechanical Department Employees, and Award No. 368, Docket No. 350, rendered on the 3rd day of August, 1939, by the Second Division of the National Railroad Adjustment Board, be lived up to by the Erie Railroad Company and that J. F. Miller be reimbursed for such time that he was held from work due to being compelled to take physical examination by the Erie Railroad Company from their doctor.

EMPLOYES' STATEMENT OF FACTS: On April 24, 1939, Chairman Miller reported to car foreman at Brier Hill, O. requesting that he desired to return to work effective May 1, 1939, after being on leave of absence as general chairman, International Brotherhood Firemen and Oilers on the Erie Railroad Property. (Rule 15d). He was advised that he had been out of active service for more than a year and it would be necessary to undergo a physical examination before returning to active duty. After handling this case with the mechanical officials, who would not let Chairman Miller return to service until he had taken a physical examination, Chairman Miller took the examination under protest and returned to work on May 8, 1939.

POSITION OF EMPLOYES: That Rule 15 (d) reads as follows; "(D) Employees serving on committees on sufficient notice shall be granted leave of absence and free transportation for the adjustment of differences between the employees and the company." was violated inasmuch as the rule does not stipulate that committeeman on leave of absence must take physical examination before returning to active service.

That Award No. 368—Docket No. 350 referred to which is applicable to this case, reads in part as follows:

"Dispute: Claim of Employees: That the practice of compulsory physical examination among mechanical department employees be discontinued and * * *"

"AWARD: Claim in respect to compulsory physical examination sustained."

Therefore the employees contend that a company doctor should not have the right to judge when a committeeman returns to work after being on

2. In the rules negotiated for this group of employes, effective October 1, 1934, there are no rules concerning physical examinations and the Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, have never attempted to negotiate such a rule, which in our opinion left the question of physical examinations to be controlled by the regulations entitled "Rules Governing the Determination of Physical and Educational Qualifications of Employes."

3. This organization has never before progressed any claim in connection with physical re-examination and it has always been understood by this organization that these examinations are conducted in accord with the employment rules previously cited. It is apparent, therefore, that the employes in progressing this particular claim are making an attempt to create new rules.

4. The Second Division by statute has the authority to interpret negotiated rules between carriers and employes. It has no managerial powers and is without authority to dictate or inaugurate new rules, regulations or practices with employes.

For these reasons, we believe this claim is not supported by the rules cited and therefore should be denied by the Second Division.

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.

The parties to said dispute were given due notice of hearing thereon.

These findings apply to the following dockets:

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The question here is over the claimed right of the carrier to require physical examinations after employment.

There is no provision in this agreement providing for re-examination of these employes. Moreover, there is nothing in the record or in the history of the controversy between the employes and the carrier on this question that would indicate that the employes were ever willing that such a practice be adopted.

Though it has been held in general that physical examinations may not be required of these employes, there must be some limit to the contention that the carrier cannot require such examinations under any circumstances. It would not be reasonable to contend that there are no circumstances in which it may not be required.

A change in the employe's condition of such a nature as to be obvious and likely to subject not only such employe but fellow employes to much hazard, would give the carrier the right to investigate to determine if his condition is such as actually to be hazardous. It does not embrace the right to examine for mere inroads of age.

Where a serious accident has occurred, or a serious illness experienced, such as to make it apparent to anyone that the man's condition has so

changed as to make it probable that his retention or resumption of work would constitute a serious hazard, it is but reasonable to assume that the carrier has the right to protect itself and fellow employes.

This does not give the right to the carrier to insist on an examination before returning to service of a furloughed employe or an employe on leave of absence without some other reason as stated in this opinion.

The carrier was not justified in requiring the employe to submit to examination in this case.

The employe will be compensated for time lost.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois this 22nd day of January, 1941.