

Award No. 720

Docket No. 682

2-Erie-FO-'42

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee R. F. Mitchell when award was rendered.

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That Rule 16, rules of the firemen and oilers' agreement, also known as rules for mechanical department employes, 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 Laborer M. H. Persing be reimbursed for such time he was held from work due to being compelled to submit to a physical examination by the Erie Railroad Company doctor.

EMPLOYEES' STATEMENT OF FACTS: On August 26, 1939, M. H. Persing reported for work after being ill for several months, he was advised he would have to report to the Erie Railroad Company's doctor for a physical examination before he could return to work. Mr. Persing took the physical examination under protest, and was held out of service until October 25, 1939, when he again reported to the Erie Railroad Company's doctor for another examination and was told to go to work.

POSITION OF EMPLOYEES: That Rule (16) which reads as follows:

In case an employee is unavoidably kept from work, he will not be discriminated against. An employee detained from work account of sickness or for other good cause shall notify his foreman not later than the close of the first day's absence, if possible. As soon as possible the employee should notify his foreman when he will be able to return to work. Employees absenting themselves for three days without notifying their foreman shall be considered as out of service and their names will be dropped from the rolls and seniority roster.

was violated insomuch as the rule does not stipulate that employes detained from work account of sickness must take a physical examination before they can return 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 employes be discontinued and * * *

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

5. No claim or protest of any nature was made by Persing or his representatives until the communication October 16, 1939, hereinabove referred to. Persing did not report to the shop until October 25, 1939, at which time he was re-examined and returned to work on the same day.

6. There was nothing in the regulations concerning leaves of absence to prevent Persing reporting for work prior to October 25, 1939, if, in his opinion, his physical condition was such as to permit him to perform usual duties.

7. Employees progressing this case alleged violation of Rule 16 of Rules for Mechanical Department Employees, effective October 1, 1934. This rule did not supersede or annul any existing leave of absence practices nor is it demonstrated by the employees that Persing was discriminated against because he was treated in exactly the same manner as all other employees are treated under similar circumstances.

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.

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

There is no provision in this agreement providing for re-examination of the employe involved in this case. Moreover, there is nothing in the record or in the history of the controversy between the employees and the carrier on this question that would indicate that the employees were ever willing that such a practice be adopted. However, this Board has consistently held that 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. See Awards No. 481 and No. 547.

This record shows Persing voluntarily absented himself from duty on May 18, 1939. He reported August 26, 1939, at the general foreman's office about 10:30 A. M. The record shows that it was obvious that his physical condition was not good and he was sent to the local examining surgeon who recommended that he rest for sixty days.

It is the contention of the employees that he took the examination under protest but he made no written protest or objections at that time. He returned to work on October 25, 1939.

Thus we have a record in which the man was sick for a period of some months. The examination of a medical man shows that he was not able to go to work at the time it is now claimed he desired to. No evidence of his availability or physical condition was furnished at that time by the employees. Under these facts the claim cannot be allowed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 30th day of March, 1942.