Award No. 541
Docket No. 499
2-Erie-BM-'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. (BOILERMAKERS)

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Rule 17 (c), General Rules of the Shop Crafts' Agreement, also known as Rules and Rates of Pay 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 Boilermaker Helpers R. W. Madden and Chester Zamiara be reimbursed for such time that they were held from work due to being compelled to take physical examinations by the Erie Railroad Company from their company doctor.

EMPLOYES' STATEMENT OF FACTS: On September 25, 1939, two (2) boilermaker helpers were called to report for work and advised that as they had been furloughed for over six (6) months from the East Buffalo roundhouse, they would have to report to the Erie company doctor for physical examination before going to work.

The two boilermaker helpers called were the senior helpers furloughed at the East Buffalo roundhouse and are namely:

R. W. Madden—seniority date—May 22, 1929: furloughed—March 20, 1939: called September 25, 1939: reported to work—sent to company doctor—was examined and pronounced O.K. for work on September 25, 1939: resumed work on September 26, 1939.

Chester Zamiara—seniority date—June 20, 1929: furloughed March 20, 1939: called September 25, 1939: reported for work—sent to company doctor—examined on September 26, 1939: held out of service until his examination papers were sent to Cleveland, approved and returned by Chief Surgeon J. F. Dinnen, same received in Buffalo on October 2, 1939, and Mr. Zamiara returned to work on October 3, 1939.

POSITION OF EMPLOYES: That Rule 17 (c), as quoted above and which reads as follows:

"(c) When forces are restored senior employes, who were laid off, will be given preference in returning to the service, if available within a reasonable time, and shall be returned to their former positions, if possible; regular hours to be reestablished prior to any additional increase in force."

Helper Zamiara, when forces were restored, the senior employe was recalled to the service. There was no time lost by either of them.

The employes further cite Award 368, Docket No. 350 by Second Division, National Railroad Adjustment Board, which is dated at Chicago, Ill. August 3, 1939. It has been our position that, based on the findings in this award, it was applicable only to the case of Machinist Martin White who was involved, and that this award was based on the facts and circumstances in that case only and did not intend to place upon the railroad company the serious responsibility of recalling to service physically unfit furloughed mechanical department employes who came within the scope of Rule 17 (c).

The employes further cite Rule 22 of the Rules for Mechanical Department Employes, effective May 1, 1929 and claim pay for time alleged to have been lost under the following provision—"Employes disciplined by suspension or dismissal and found blameless will be reinstated and reimbursed for any wage loss suffered by them." We do not believe that this provision of Rule 22 has any bearing or relation to the situation that is now before the Board for consideration. Neither of the employes lost any time as a result of this physical examination. It is our belief that this claim is unjustified and that it should be declined by your Board for the following reasons:

1. Boilermaker Helpers Madden and Zamiara were both called when work was available in the order of their seniority and accordingly there was no violation of Rule 17 (c).

2. Physical examinations under employment regulations have been effective for many years and these regulations were not abrogated or canceled by the negotiations that resulted in rules and rates of pay for mechanical department employes, which first became effective January 4, 1923 and now covered by the rules effective May 1, 1929.

3. It is entirely the prerogative and the responsibility of management to determine when increase or decrease in forces is necessary, and in this instance, the fact that these boilermaker helpers reported to the company surgeon and were qualified in order to be ready for work is in accord with the practice that is often followed by supervising officers in order to prevent them from being caught short when qualified men are necessary to be recalled to the service.

4. Award No. 368, based on Docket No. 350, would not be applicable in the instant case because the circumstances are entirely different.

5. Rule 22 (c) which has been cited and is used as a basis for pay claims is entirely unfounded as there was no discipline or suspension involved in this case, nor were these employes charged with any violation of any rules.

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 physical examinations of these employes.

The employes will be compensated for the 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.