

Award No. 549

Docket No. 537

2-Erie-MA-'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. (MACHINISTS)**

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That the practice of instructing employes to take physical examinations be discontinued and that Anthony DiRito, machinist helper, Secaucus roundhouse, New Jersey, be compensated for time lost when he was ordered to visit chief surgeon at Cleveland, Ohio, to undergo a physical examination.

EMPLOYES' STATEMENT OF FACTS: On December 4, 1939, Anthony DiRito, a machinist helper at Secaucus, N. J. roundhouse, was sent to Cleveland, Ohio, for a physical examination by the company physician of the Erie Railroad Company.

POSITION OF EMPLOYES: That Award No. 368, Docket No. 350, of the National Railroad Adjustment Board, Second Division, was violated by the Erie Railroad Company when Anthony DiRito, machinist helper, was forced to go to Cleveland, Ohio for a physical examination.

That Award No. 368, Docket No. 350, above referred to, is applicable to this case and reads as follows:

"DISPUTE: CLAIM OF EMPLOYES: That the practice of compulsory physical examination among mechanical department employes be discontinued and * * *."

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

That the Erie Railroad violated this award when they compelled Anthony DiRito to submit to a physical examination; that Anthony DiRito is entitled to such compensation as he may have lost (which is two regular shifts) due to this compulsory physical examination, under Rule 22 (c) which reads as follows:

"Employes disciplined by suspension or dismissal and found blameless will be reinstated and reimbursed for any wage loss suffered by them."

Therefore, the following Exhibits A-B-C are submitted to show that every effort has been made to settle this dispute on the Erie property and that it has been properly progressed with the Erie management.

Therefore, the employes request that a decision be reached upholding their claim.

In General Chairman Nestor's letter of February 16, 1940, which has been quoted, claim has been made for two days' lost time as a result of the examination in Cleveland on December 4, 1939, and while President Jewell's letter June 25, 1940, to the Second Division makes no reference to any particular date, he does make reference to time lost as a result of these visits to Cleveland. The records show there was no time lost on either occasion.

In addition to the compensation under the New Jersey State Compensation Law, DiRito has been reimbursed for expenses incurred in connection with these trips to Cleveland, and at no time did he ever raise any objection to coming to Cleveland for these examinations and check-ups. Machinist Helper DiRito's visits to Cleveland were the result of his own negotiations with the claim agent and the chief surgeon, and were not the result of any order issued by any officer or supervisor at Secaucus, N. J.

It appears that this case has been progressed ex parte by the organization without determining the facts, and without properly progressing the matter with the railroad company, it being alleged that this examination was a violation of Award No. 368, Docket No. 350, of the Second Division.

There is submitted Exhibit C, a statement outlining historical data concerning physical re-examinations on the Erie Railroad. This exhibit is hereby made part of this ex parte statement.

There is also submitted Exhibit B copy of a report signed by Mr. John A. Marvin, secretary-treasurer, General Chairmen's Association of the Erie Railroad. On November 17, 1936, the members of this Association met with the chief surgeon, Doctor J. F. Dinnen, in his office at Cleveland, Ohio, for the purpose of discussing physical re-examination and physical examination cases. Obviously a conclusion was reached and apparently concurred in by all present that, "the final disposition of these cases should be left to the chief surgeon instead of the local medical examiner."

The request that is before your Board in this particular case is entirely unjustified, and it should be declined for the following reasons:

1. This case is progressed by the employees to your Board based on a communication of February 16, 1940, which is quoted hereinbefore, but without investigation to determine the facts or to handle in accordance with the requirements of the Railway Labor Act.
2. Question of physical examination is fully covered in Exhibit C submitted and demonstrates very clearly that at no time has the railroad company negotiated a rule that would interfere with or abrogate the right and responsibility of the railroad company to require physical re-examination.
3. The physical examination at Cleveland on December 4, 1939, which appears to be the one which is made the basis of this ex parte submission, is the result of a personal injury case that was handled under the New Jersey State Compensation Law, negotiations being handled direct by Machinist Helper DiRito with the claim agent and the chief surgeon, and, therefore, is not the result of any action by mechanical department officers at Secaucus.
4. In each of the visits of DiRito to Cleveland, the claim department who handled the matter strictly from a claim standpoint, and under the New Jersey State Compensation Law, paid for meals and traveling expenses.
5. The claim is made for time lost, while the records show that DiRito lost no time as a result of these trips to Cleveland, as he was permitted to work the same number of days during the month that was allotted to other shop craft employees.

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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523	533	539
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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.

DiRito was qualified for work on February 13, 1939.

There was no loss of time as DiRito worked the same number of days as was worked by other shop craft employes during the month of December, 1939.

AWARD

Claim sustained as to question of physical examination.

Claim denied as to pay for loss of time.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

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