

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 385

Heard at Montreal, Tuesday, November 14th, 1972

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Payment to probationary employees for time spent undergoing medical examinations.

JOINT STATEMENT OF ISSUE:

A number of newly hired warehousemen at Toronto were required to undergo medical examinations. The Brotherhood contends that they are entitled to be compensated therefor in accordance with either Article 5.1 or 5.6 of Agreement 5.1. The Company contends that as these individuals were aware of the fact that successfully passing a medical examination was necessary before they could be permanently employed payment for same is not justified.

FOR THE EMPLOYEES:

(SGD.) J. A. PELLETIER
NATIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) K. L. CRUMP
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. O. McGrath – System Labour Relations Officer, Montreal
G. J. James – Labour Relations Assistant, Montreal
W. Wilson – Labour Relations Assistant, Montreal
E. Dunnville – Assistant Manager Express, Toronto

And on behalf of the Brotherhood:

J. D. Hunter – Regional Vice President, Toronto
T. N. Stol – Local Chairman, Toronto

AWARD OF THE ARBITRATOR

The employees in question were probationary employees within the meaning of Article 11.1 of the collective agreement. Their continued employment was dependent upon whether or not they were found suitable by the conclusion of the probationary period. They were, nevertheless, employees of the Company and members of the bargaining unit during that period.

It was during their probationary period – and after they had become employees – that the grievors were required to undergo medical examinations. Generally speaking, where the Company requires an employee to undergo a medical examination, or to act otherwise in accordance with its instructions, the employee may be said to be “at work”, even though he is not performing the particular tasks of his classification. See, for example, **Cases No. 310 and 311**.

In the instant case, had the employees concerned been regular employees past the probation period it would seem, having regard to what was said in the cases referred to, that they would be entitled to payment in respect of their time spent undergoing medical examinations at the request of the Company. Here, the employees concerned had not concluded their probationary periods. In the usual course, they would have been required to pass a medical examination in their own time prior to being hired. In the instant case, however, the Company hired the employees without requiring them to pass medical examination because it needed their services without delay. It then required them to undergo medical examinations during the course of the probationary period. The requirement of passing the medical examination was quite proper. The only question is whether the employees concerned were “at work” and thus entitled to payment for the time spent undergoing such examination. Where the examination was taken during regular working hours, the employees concerned were paid. Where the examination was held outside the employee’s regular working hours – and the scheduling was the Company’s, not the employees’, for it was the Company that required the examination to be taken – no payment was made.

Quite apart from this obvious inconsistency, it is my view, as in the cases referred to, that the employees in question must be considered to have been “at work”, and entitled to payment at the appropriate rates while undergoing the medical examinations required of them by the Company. Where a person, prior to being hired by the Company, undergoes a medical examination in the hope of being hired, then he is certainly at that time not an employee, not covered by the collective agreement, and not entitled to be paid. Where, as in the instant case, the Company hires employees to meet its own need for personnel and later requires them to undergo a “pre-employment” medical examination, the situation is quite different. As far as the employees involved – and indeed; as far as the facts – are concerned, it is no longer a “pre-employment” examination, because the persons concerned are already employed. If they do not meet the medical standards, then of course their employment can be terminated by the end of the probationary period, but that is another matter, and does not affect the fact of their being employees at the material times, and entitled to payment in accordance with the collective agreement. For the foregoing reasons, the grievances are allowed.

(signed) J. F. W. WEATHERILL
ARBITRATOR