



Award No. 14328

Docket No. MW-14612

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it dismissed and/or held out of service Section Laborer Ray Moler without benefit of a hearing and without just and sufficient cause. (Carrier's file PR-D-199989)

(2) Mr. Ray Moler be reinstated to his former position, with seniority, vacation and all other rights unimpaired and compensated for the wage loss suffered in conformance with the provisions of Rule 19.

EMPLOYEES' STATEMENT OF FACTS: The claimant was regularly employed as a section laborer in the gang assigned to Section No. 390 when he suffered a complete loss of vision in his left eye. When he was examined by an eye specialist in December of 1961, he was informed that his loss of vision resulted from secondary glaucoma. The claimant informed his supervisors of his sight impairment and continued to work as a section laborer until August 24, 1962, when he was granted a leave of absence in order that he could have the diseased eye removed.

After recovering from his operation, the claimant obtained a release from Dr. S. D. Cowan, which verified the fact that the claimant was physically able to return to work. When the claimant reported for work on Monday, December 3, 1962, he was advised by Roadmaster O. E. Patton that he would not be permitted to return to work. Subsequently, the claimant received a letter from Superintendent B. L. Schoech, informing him that he had been "superannuated" effective November 30, 1962.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 1, 1938, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: 1. There is an Agreement between the Chicago, Rock Island and Pacific Railroad Company and the Brotherhood of Maintenance of Way Employees bearing and effective date of May 1, 1938 (as subsequently revised, interpretations and Memo Agreements and understandings of which the parties have knowledge). A copy of this Agreement is on file with your Board and by reference is made a part of this submission.

dated January 31, 1963. That decision declining your request is, therefore, here reaffirmed."

12. The final letter on this matter written on the property was that from the General Chairman to the Vice President-Personnel dated March 26, 1963, reading:

"This is in reference to your letter of January 31, 1963, your file no. PR-D-199989, in connection with the superannuation of Mr. Ray Moler on November 30, 1962.

"Mr. Mallery, I cannot agree with your decision that Mr. Moler's superior officers did not have any knowledge of this impairment until Mr. Moler made application for his leave of absence for the removal of his eye.

"We would like to have the opportunity of discussing it further with you at our next conference, and I am therefore listing it accordingly."

13. The final conference did not resolve the differences.

OPINION OF BOARD: On August 30, 1962, Claimant was granted a leave of absence for the purpose of undergoing removal of his left eye by surgery. On or about November 27, 1962, after receiving the following release from his doctor, which he handed to Carrier, he sought to return to work:

"To Whom It May Concern.

"Ray Moler was in today for examination of his eyes. Right eye vision 20/20 and with glasses 20/15. Left eye was enucleated for secondary glaucoma August 30, 1962. He has fully recovered from the operation and may return to work December 1, 1962."

His application was denied. Thereafter, on December 18, 1962, the Superintendent wrote Claimant:

"As a result of a recent operation performed on you by your private physician, Dr. S. D. Cowan on August 30, 1962 for enucleation of the left eye and as a result thereof, you are found to be substandard under our physical re-examination requirements and since your condition is such that we do not feel it would be safe to you or your fellow employees to continue in active service, your record is being posted as 'Superannuated' effective with November 30, 1962.

"This is with the understanding that your name will be continued on the seniority roster, with proper notation thereafter, and that whenever you are physically able to re-enter the active service of the railroad, at that time consideration will be given to returning you to service and reopening your record, providing you have not then attained the age of 70 years. . . ."

Under the same date the General Chairman wrote the Superintendent:

"We have been advised that section man, Ray Moler of Powhattan, Kansas, is being held out of service following an operation for the removal of an eye resulting from a long standing condition. It is ironical and seems unreasonable that an employe would be permitted to work with a condition that might affect his health and efficiency, but when

that condition is removed he is not permitted to resume service. Certainly his vision is no worse and his condition is much better than before the operation.

"Will you kindly give consideration to these facts and return Mr. Moler to his original position?"

At the ultimate appeal level the claim that Claimant be reinstated and made whole for loss of wages was denied by Carrier.

Carrier argues that the physical standards to be met by its employees are not subject to attack by the Organization; and, the application of those standards, by the Carrier, cannot be construed as a violation of the collective bargaining agreement.

We held in Award No. 14249 that:

"It is the prerogative of Carrier to determine the physical qualifications of its employees so long as its findings are not arbitrary, capricious or exercised in bad faith or for the purpose of circumventing the terms of the Agreement."

That a wrongful physical disqualification may be found by this Board to be a violation of a collective bargaining agreement, without expressed provision in the Agreement, has been established in *Gunther v. San Diego & Arizona Eastern Railway Company*, 382 U.S. 257. Award Nos. 14246 and 14249.

The only substantive defense advanced by Carrier, in the record, is the following conclusionary statement that is unsupported by probative evidence:

"....the blindness in Mr. Moler's left eye, prevented him from meeting the Carrier's physical requirements, because of the imposition of an important safety hazard to himself and fellow employees with whom he might work."

Carrier having adduced no factual evidence that Claimant did not meet its unilaterally determined and, in the record, not quoted alleged physical standards relative to vision; and, not having adduced any evidence, on the property, that loss of sight in one eye was an absolute physical disqualification for a Section Laborer, we find that Carrier—in failing to reinstate Claimant—acted in an arbitrary manner in contravention of the Agreement.

Carrier has raised before this Board procedural defenses predicated on Article V of August 21, 1954, Agreement. Since said defenses were not raised on the property, Carrier is deemed to have waived them.

The record reveals that Claimant was granted an annuity under the Railroad Retirement Act on January 20, 1964. Therefore, to award Claimant reinstatement cannot be effected. However, we will award Claimant loss of wages in the period from November 30, 1962 to the date he was granted the annuity; the loss to be the difference between what he would have earned, less what he actually earned, during the period.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained with monetary damages as prescribed in the Opinion; and, denial of the prayer for reinstatement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of April 1966.