Award No. 1485
Docket No. CL-1273

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul W. Richards, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

LITCHFIELD & MADISON RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that Steve Gnojeski should be restored to service with all seniority rights unimpaired and with pay for wage losses suffered retroactive to December 11th, 1939."

EMPLOYES' STATEMENT OF FACTS: "The carrier for the past few years have been subjecting such employes as covered by clerks agreement to physical examination.

"On December 5, 1939, the carrier notified Steve Gnojeski to appear before the Company medical examiner for examination. This Mr. Gnojeski did.

"On December 11, 1939, the carrier by means of letter removed Mr. Gnojeski from the service of the carrier because of a suspicious cardiac lesion, and for falsification of his application for employment. His removal was effected under our Rule No. 10, Paragraph V. See our Exhibit A.

"Mr. Gnojeski entered service September 16, 1936 and appears on seniority roster in Group No. 3, as September 16, 1936. He was never given an application blank for employment to be filled out by himself upon entering the services of the carrier on September 16, 1936, nor was Mr. Gnojeski sent to the Company medical examiner for physical examination upon entering the service.

"During the first part of the year of 1939, more than two years of employment with the carrier, Mr. Gnojeski was given an application for employment to be filled in along with other employes who were in the service that had never made out an application for said employment. The application at this time was to be used for record purposes presuming to be compiled account to various government laws covering the railroad employes.

"One of the questions answered by Mr. Gnojeski was 'can you see perfectly and readily distinguish colors?' to which Mr. Gnojeski answered, 'yes.'

"Upon taking the physical examination on December 5, 1939, some three years after entering the service, it developed that Mr. Gnojeski had one eye (Left Eye) injured.

"The management talked to the general chairman about the condition of Mr. Gnojeski's eye and wanted to know if the organization would agree to Mr. Gnojeski's removal from the service account of falsification. Our com-

"It is further the legal duty of the carrier to provide safe conditions for fellow employes and members of the public who might be endangered if an employe is not physically fit. If an employe under physical disability, in the course of his work, sustains an injury which is caused or contributed to by his disabled condition, or if injury is inflicted upon a fellow employe or member of the public which is caused or contributed to by the disabled employe, the carrier may be, and often is, charged with violation of some duty to its employes or to the public and called upon to respond in damages accordingly. Hence, it is the fundamental and recognized right of the carrier to say who may enter its service and prescribe the conditions of employment which will be required of the employe after entering its service. The same freedom of action on the part of the carrier applies to the right of discharge, and the carrier has the lawful right to discharge an employe for proper cause, so long as the carrier does not under cover of that right intimidate or coerce the employe with respect to his rights of self-organization and representation. These rights of selection and discharge of employes cannot be taken from the carrier and given to or divided with the employes except through an agreement affecting such rights. These fundamental and recognized rights of the carrier have not been taken away or interfered with by the Railway Labor Act.

"The United States Supreme Court has expressly held that the Railway Labor Act and the National Labor Relations Act do not interfere with the normal exercise of the right of the employer to select its employes or to discharge them, so long as the employer does not under cover of that right intimidate or coerce its employes with respect to their self organization and representation.

Texas & N. O. Railroad Co. et al. vs. Brotherhood of Railway & Steamship Clerks et al., 281 U. S. 548, 74 L. Ed. 1034, and cases cited;

National Labor Relations Board vs. Jones & Laughlin Steel Corporation et al., 301 U. S. 1, 81 L. Ed. 893, and cases cited.

"In the Jones & Laughlin Steel Corporation case, supra, the United States Supreme Court, speaking through Mr. Chief Justice Hughes, after citing a number of cases in which the Court had considered the effect, purposes and analogous objectives of the Railway Labor Act and the National Labor Relations Act, said:

> **'The Act does not interfere with the normal exercise of the right of the employer to select its employes or to discharge them.** The employer may not, under cover of that right, intimidate or coerce its employes with respect to their self-organization and representation, and, on the other hand, **the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.'**

"For the reasons given, and since there is no agreement in the instant case which in any way affected Respondent's right to discharge Gnojeski for physical disability, Respondent respectfully submits that its action in effecting such discharge was justifiable and legal, and that the Brotherhood's protest herein cannot be sustained under the law which created this Honorable Board. Accordingly, Respondent asks that the claim in this proceeding be disallowed."

OPINION OF BOARD: Following a physical examination of claimant Steve Gnojeski by the Carrier's physician on December 5, 1939, the General Agent of Carrier by letter of December 11, 1939 notified Mr. Gnojeski as follows:

"Effective at once you are being removed from the service of this Company as provided by Paragraph V, Rule 10 of our Agreement with the B. of R. C., because of a suspicious cardiac lesion which was

revealed by physical examination on December 5th, 1939, which also disclosed the falsification of your application."

In this letter there was no mention made of defective eyesight. On December 16th, 1939 Mr. Gnojeski wrote the General Agent the following:

"Exceptions is taken to my removal from the service without an investigation under Rule Eleven, Paragraph B.

"I am requesting a stenographic investigation concerning your charges under Rule Eleven, Paragraph B and in the event the charges are not sustained, Rule Eleven, Paragraph J shall apply. I am selecting Bro. A. R. Green, General Chairman of the B. of R. C. to represent me at the investigation."

A copy of this letter was forwarded by the General Agent to the General Manager and on December 19th, 1939 the General Manager wrote the General Agent concerning the letter from Mr. Gnojeski in part as follows:

"Mr. Gnojeski is not charged with any offenses in your notice of removal from service. He has been removed upon recommendation of our Medical Examiner for a physical disability. There is nothing in the agreement with his craft that provides for an investigation under such circumstances, and in his case we will be governed entirely by the medical report covering his case.

"His request for an investigation is therefore denied."

A copy of this letter was sent to Mr. A. R. Green, General Chairman, Brotherhood of Railway Clerks. On December 20th, 1939 following receipt of the letter from the General Manager the General Agent wrote Mr. Gnojeski as follows:

"Replying to your letter of December 16th, 1939, relative to your removal from service with this Company.

"It is noted that you request an investigation and refer to Paragraph B, Rule 11 of the Agreement with the B. of R. C. as your authority. If you will note this rule concerns only discipline and grievances covering offenses. You are not charged with any offense. You have merely been removed upon recommendation of our Medical Examiner, which is the result of examination made by him, wherein he found a physical disability.

"There is nothing in the Agreement that provides for an investigation under such circumstances, and in your case I have been instructed to be governed entirely by the medical report.

"Your request for investigation is denied."

In a letter to the General Agent dated January 9th, 1940 General Chairman Green stated, inter alia, that Rule 11, Paragraph (g) provides for Mr. Gnojeski's request for an investigation, and that the Carrier's denial thereof is in violation of said rule; that removal of an employe from service upon advice of the Company's physician without an investigation of his findings when requested by the affected employe in order that an honest effort be afforded the employe to submit other medical examiners in his behalf, only reflects a premeditated thought when such an investigation is denied. This letter concluded with the following:

"Enclosed you will find two separate Medical Examinations by two independent Physicians, neither in the employ of the Carrier or the Brotherhood, and upon these two findings will you endeavor to return Mr. Gnojeski back to service, and pay him for every day that he has been deprived of his right to employment."

"Your prompt attention in the matter will be greatly appreciated."

To this letter of January 9, 1940 the General Agent replied on January 18th by letter in which, inter alia, he said:

"The questions raised in your letter have been submitted to the Management. I am advised that there is nothing in the Agreement with the Clerks that provides for a hearing for physical disqualification.

"Your request for the return of Mr. Gnojeski to service and for investigation is again denied."

On January 25th, 1940 by letter the General Chairman presented an appeal to the General Manager from the decision of the General Agent on claim of Mr. Gnojeski:

"For his removal from the service of the Company without an investigation, and also being denied a right of a hearing."

To this letter the General Manager replied on January 27th, 1940 stating that Rule 11 is not predicated upon a removal due to a physical disability and concluded the letter in these words:

"Mr. Gnojeski was removed from our service under instruction from this office upon recommendation of our examining physician who has no interest in the matter other than to give us a report of actual physical conditions found to exist at the time of examination. This examination is final so far as our Company is concerned and the action of our General Agent, Mr. Schutze, in taking this party out of service is respectfully affirmed."

By letter dated March 8th, 1940 to the General Manager, General Chairman Green protested under Rule 10 (1) the omission of Steve Gnojeski from the January 1, 1940 seniority roster and requested that his name be reinstated with seniority dating from September 16, 1938.

The aforementioned reports submitted by the General Chairman to the General Agent, being reports of physical examinations made of Mr. Gnojeski by two independent physicians, were dated respectively December 16th and 18th, 1939. One physician's findings were that Mr. Gnojeski's heart and blood pressure were normal. The other's report was that there were no heart murmurs or abnormalities, and no sign or symptom of cardiac lesion and that Gnojeski was found to be in good physical condition with only one defect, his left eye, and was judged able to do a good day's hard manual labor. For a number of years Gnojeski had been in the Carrier's service, appearing on seniority roster in Group No. 3, and functioning normally according to the showing in the docket.

It appears from the foregoing that Mr. Gnojeski protested his removal. In the controversy that then developed before the General Agent, Mr. Gnojeski challenged the alleged defective condition of his heart stated as ground for removal by the General Agent. He made the showing of the two independent examinations in support of his claim that the alleged heart defect did not exist. He requested a hearing and investigation of the facts. The Carrier refused to grant a hearing. Carrier's reason for the refusal has been set out in the foregoing. On presentation here of the controversy that was before the General Agent the Carrier reaffirms that it solely must be considered as having the right of determining the physical condition of its employes, there being no agreement in the schedules that the Carrier will share with the employe the responsibility of determining that fact.

In the opinion of the Board, the Carrier has taken an extreme position, one that extends beyond confines heretofore established in the awards of this Division. The Carrier's theory assumes the necessity of an express agreement, giving to the employe a voice in the deciding of his physical condition as a condition precedent to the employe speaking in protest against removal on ground of physical unfitness. This Board has adopted a broader view. It is

committed to the general proposition that, should it be determined that the Carrier has the authority to hold an employe out of service on account of his physical condition and that there is no review of such action of the Carrier, the employe would be denied a basic right given him under the contract.

The opinions of the two independent medical examiners were in terms of definite and positive negation of heart impairment. The opinion of the Carrier's physician was that there was "a harsh sound over the apex of the heart which **suggests a beginning** valvular change of the heart or a changing in the structure of its lining." (Emphasis supplied by writer of opinion.)

The foregoing medical testimony relative to heart impairment was before the General Agent for him to act upon. In the opinion of the Board it exhibited the actuality of a factual controversy. That is, it was apparent to the General Agent that the Carrier's physician's statement went no further than mention of a beginning of a heart change, and this mentioning of a beginning he circumscribed by saying it was something suggested to him by a harsh sound. (See emphasized words in above quote.) Had there been nothing more before the General Agent it is conceivable that, in fairness and reasonableness, he could have viewed the forthwith and final dismissal of this employe, and added to that elimination of his name from the seniority roster, as something unjustifiably precipitate. But there was something more, the reports of two independent medical examinations made respectively 11 and 13 days after the Carrier's. Their content has been shown. In the opinion of the Board it can not be said that the showing did not rise to the dignity of the presentment of a grievance on part of this employe. A hearing should have been granted thereon by the General Agent.

During progress of the appeal the Carrier pointed out another physical defect of this employe. A traumatic cataract of many years standing had deprived him of sight in his left eye. Carrier's physician reported total complete permanent blindness in that eye, and 20/30 vision in the right eye. But with this report before them the management chose to remove claimant "because of a suspicious cardiac lesion." This Board has expressed disapproval of the injecting by the Carrier of new matters in course of appeal to justify what was complained of on the hearing appealed from. In the instant case the question of impaired sight was answered by Petitioner, also during progress of the appeal. What transpired in that respect has the characteristics of an active controversy, presenting several elements of difference, as to whether the defective sight was a ground that would have justified this employe's removal. The Carrier's theory appears to be that there was this other ground, defective sight, for the removal. But the place for orderly hearing on and decision of this defense to the controversy was on the property, at the hearing upon claimant's grievance that the carrier should have granted. It was not for the Carrier to decide in advance that its defense would be good when disclosed on appeal and on that ground deny a hearing to which the employe had a right on the record as it stood. Accordingly, the question of defective sight as a good ground for the removal is not, in the opinion of the Board, presented for present decision. It may be noted too, in passing, that, frequently, incapacity on account of defective vision can not be determined satisfactorily without an additional factor, i. e., the requirements of the job affected.

In the opinion of this Board the situation here disclosed compels the conclusion that the claim should be sustained, with compensation for lost time beginning January 18, 1940. On that date, without any uncertainty about it, the employe was denied rights accorded him in the agreements.

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 employe involved in this dispute are respectively carrier and employe 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 the refusing to grant hearing was violative of Rule 11 cited by Petitioner, particularly Paragraph (g) thereof.

AWARD

Claim sustained as stated in opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of June, 1941.