

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
QUANAH, ACME & PACIFIC RAILROAD

STATEMENT OF CLAIM: "Claim of Employees' Committee: first; that the removal from the service of Section Laborer, J. E. Payne, Roaring Springs, Texas, on August 17th, 1940, because of alleged physical disabilities was improper and that therefore J. E. Payne shall be reinstated to the service, with seniority rights unimpaired.

Second; that Section Laborer J. E. Payne shall be paid for time lost at Section Laborer's rate of pay retroactive to August 17th, 1940."

OPINION OF BOARD: The claimant was removed from the service of the Carrier August 17, 1940, because of a report by the Carrier's general surgeon that he was physically unfit to continue his work. He had been more than eleven years in the Carrier's employ and the alleged physical defects were discovered on an examination which was taken in connection with an application for promotion.

At the instance of the General Chairman of the Brotherhood of Maintenance of Way Employees an investigation was made by the Carrier September 11, 1940. At this hearing it was brought out that the claimant since he left the service of the Carrier had continued to do heavy work for another employer. It was conceded that he had a hernia but not of a serious nature, a condition which had been known to the Carrier for three years. Statements from other doctors were submitted by him which indicate that as to his other ailments there was a difference of opinion between the Carrier's surgeon and the other medical men.

As we view the case it is unnecessary to attempt to decide as to his actual condition except to say that there is basis for a bona fide controversy on the subject. For the principle is well settled that, regardless of any specific rule in the agreement between the Carrier and its Employees, an employe cannot be lawfully discharged on the ground of physical disability without being given a hearing, if he desires it, to present his evidence as to his physical condition. See Awards 362, 728, 1485, 1487. And the requirement of a hearing is not met, if the Carrier's observance of it is merely perfunctory and if reasonable consideration is not given to the evidence adduced by the employe.

In this case the Carrier does not pretend to have complied with this rule. There was the formality of a hearing. However, in the Carrier's Ex Parte Submission to this Board, dated January 14, 1941, we find the following statement over the signature of the President:

"Undoubtedly the agreement left the carrier with the liberty to dispense with the service of an employe, upon the advice of its highest surgical or medical adviser, in the interest of safety to other employes and to its own safety."

In other words, this Carrier, instead of rendering an impartial judgment on the evidence submitted, chose to rest its decision on an assumed right to discharge an employe solely on the advice of its own surgeon. This right it did not have.

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 Carrier violated the Agreement in its discharge of the claimant.

AWARD

The first claim is sustained; the second claim is sustained, the claimant to be paid for time lost at section laborer's rate of pay retroactive to August 17, 1940, less such wages as he may have received from other sources during such period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 9th day of July, 1941.