Award No. 13667
Docket No. MW-13710

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it disqualified J. L. Jeffres as section foreman.

(2) Mr. J. L. Jeffres now be reinstated as Section Foreman with seniority and all other rights unimpaired and that he be allowed eight (8) hours' pay at the section foreman's rate for each work day within the period extending from July 7, 1961 to the day of his reinstatement to a position of Section Foreman.

EMPLOYES' STATEMENT OF FACTS: On March 20, 1961, Claimant J. L. Jeffres was directed to and did submit to a hearing examination performed by a Carrier-designated doctor, Dr. O'Guinn of Mobile, Alabama. At the conclusion of said examination, the claimant was assured by Dr. O'Guinn that although his hearing was slightly deficient, it was not severe enough to warrant his removal from service. The doctor further advised Claimant Jeffres that his recommendation to the Carrier would be to that effect.

Following said examination, the claimant returned to work and continued to perform service as a section foreman until June 20, 1961, when he was advised that the Carrier had disqualified him as a section foreman because of a hearing deficiency. During the period preceding said disqualification, the claimant had worked as an Extra Gang Foreman, as a Section Foreman and as a Bullgrader Operator.

Immediately following his examination by Dr. O'Guinn and for the express purpose of correcting the minor hearing deficiency that Dr. O'Guinn found to exist, Claimant Jeffres submitted to a hearing test, and thereafter purchased a Zenith hearing aid, which he has worn ever since.

On August 8, 1961 and on September 19, 1961, the claimant voluntarily, and at his own expense, submitted to examinations by two doctors. The findings of these two doctors agreed with the diagnosis of Dr. O'Guinn in that each found the claimant to have a minor hearing defect. Moreover, each found said hearing deficiency to have been entirely corrected by the use of a hear-

to being held negligent in retaining a clerk in its service who was suffering from epilepsy and who had limited vision, and whose duties required him to traverse hard-surfaced floors, and in permitting packages to lie on the floor where employe could trip over them due to his limited vision.

In addition, a railroad was held negligent and responsible in damages in the case of **Shepard Admx. v. NYNH&H R. Co.**, 300 F. 2nd 129, by the United States Court of Appeals, Second Circuit. In that case the company was held negligent due to having rehired an employe knowing of his prior stay at a mental hospital and without having an allegedly fully adequate report on his condition, and knowing of his conduct after reemployment.

Also, in the case of **Bayles v. L&N R. Co.**, 129 So. 2d 679, the court held that Bayles had alleged a cause of action against this railroad when he charged that his injuries were due to his being assigned work which this railroad knew he was physically unable to perform. In that case the court said:

> "But the United States Court of Appeals for the Third Circuit has said that where a plaintiff can prove that management forced a sick employe, of whose illness they knew, or should have known, into work for which he was unfitted because of his physical condition, a case is made out for the jury under the Federal Employers' Liability Act. Dunn v. Black Lick Railroad, 3 Cir., 267 F. 2d 571; Nuttall v. Reading Company, 3 Cir., 235 F. 2d 546. See also Dunn v. Conemaugh & Black Lick Railroad, D.C., 162 F. Supp. 324, and Brown v. Pennsylvania Railroad Co., D.C., 179 F. Supp 858."

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In conclusion carrier reiterates that it was entirely justified in disqualifying Foreman Jeffres and withholding him from service until such time as his hearing may improve to the extent that it would be safe for him to work without the use of a hearing aid. There is no basis for an affirmative award, under the agreement or otherwise, and the claim of the employes should be denied.

OPINION OF BOARD: Claimant, a Section Foreman, was removed from service because of hearing deficiency. There is no question but that Claimant's hearing is defective, but it also appears that he can meet the applicable requirements when he uses a hearing aid. Carrier has offered to reinstate Claimant to service with the understanding that he would be restricted to operate off-track machines, and would not be permitted to operate motor vehicles on the highways. Claimant has rejected the offer and the only dispute is whether or not Claimant should be restored to unrestricted service as a Section Foreman, since he owns and uses a hearing aid.

In view of his good record and the remarkable improvements that have been made in hearing aid equipment, Claimant's case has considerable appeal. On the other hand, it appears that Carrier has a well-established policy of not permitting employes to operate motor cars or work near locomotives or other moving equipment when they do not meet Carrier's physical standards without the use of hearing aids. Carrier's concern seems to be that a mechanical hearing device may fail to function at a critical time. There is no evidence that this policy has been applied in a discriminatory or uneven manner, or that Carrier is acting arbitrarily or in bad faith in the present situation. Under the circumstances, no valid basis is perceived for upsetting

Carrier's determination. Since Carrier alone has the responsibility for the safety of its employes, this Board is simply not in a position to require Carrier to reinstate a man, dependent on a mechanical device for the correction of hearing defects, to employment that, unlike that of clerical, administrative and certain other occupations, necessitates his working in and about moving equipment. We must deny the claim. See Award 11909 of this Division as well as First Division Award 19538, Fourth Division Award 904, SBA 197 Award No. 501 and the decision of the United States Court of Appeals for the Ninth Circuit in Gunther v. San Diego & Arizona Eastern Railway Company, 336 Fed 2d 543 (1964).

Claimant is an employe of long service and has progressed, over the years, from track laborer to Assistant Section Foreman and then to Section Foreman. He has held the last named position since January 16, 1946. We are hopeful that an acceptable position can be found for him by Carrier that will not require his presence in a hazardous area.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1965.