

Award No. 1309

Docket No. 1231

2-L&N-CM-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 91, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

**LOUISVILLE AND NASHVILLE RAILROAD COMPANY
(Nashville Terminals)**

DISPUTE: CLAIM OF EMPLOYES: 1—That the termination of the service rights of Coach Cleaner Sallie Fite at 10 A. M. September 22, 1947, by the Carrier, was not authorized under the Current Agreement.

2—That accordingly, the Carrier be ordered to restore this employe to service with pay for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: Coach Cleaner Sallie Fite, hereinafter referred to as the claimant, was employed as such by the carrier at Nashville Terminals, Nashville, Tennessee, during the hours of 7 A. M. to 3 P. M., with seniority dating of December 12, 1916.

The carrier advised the claimant on September 16, 1947, that she would be retired from active service because she was unable to perform coach cleaners' duties, after her regular tour of duty on September 20, 1947. However, the claimant reported for duty on Monday, September 22, 1947, and worked her regular assignment until removed from the service at 10 A. M. by the carrier on that date.

The agreement effective September 1, 1943 is controlling.

POSITION OF EMPLOYES: It is submitted that there is nothing in the aforesaid agreement which authorized the carrier to arbitrarily terminate the service rights of this claimant, and no such rights as the carrier exercised at 10 A. M. on September 22, 1947, was derived from any written or verbal understanding made between the carrier and System Federation No. 91, subsequent to September 1, 1943, the effective date of the current agreement.

It is indisputable, therefore, that the carrier acted to deny this claimant and her local chairman of every fundamental principle guaranteed in that part of Rule 33 of the controlling agreement, reading—

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his local chairman will be apprised of the precise charge

showed her weight to be 180 pounds, her height is estimated at five feet.) It is further realized that she was highly susceptible to injury because her duties required her to be in and around moving passenger cars, and trains, and to cross tracks over which cars and engines were constantly moving.

Simply stated, she had reached the point where she could not carry her weight, the way it was distributed, and do her work. Carrier submits statement (Exhibit AA) from Assistant Car Foreman J. A. Johnston, who is directly in charge of this work at Nashville Terminals, and who says that the claimant was unable to perform even the lightest duties that could be assigned to her. See also statements of Coach Cleaners Prather Davis, Robert Lee, Albert Turney, H. Hall and H. Lane (Exhibits AB, AC, AD, AE and AF, respectively) who worked with her and who say that this employee was unable to properly perform her duties.

In handling the matter on the property, the organization took the position that Mrs. Fite was removed from service in violation of Rule 33 of the controlling agreement; that rule provides:

"No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his local chairman will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Mrs. Fite was not charged with the violation of any rules or instructions and no question of discipline was involved, then or now. Had this carrier invoked Rule 33, dismissed this employe for failure to properly perform her duties, she would not have retained pass and other privileges which are enjoyed by retired employes. This is merely a case of an employe being physically unable to safely and properly perform her duties and, therefore, is not a case to which Rule 33 is applicable. Carrier has never used the discipline rule of an agreement as a basis for disqualification of any employe because of physical disability. To do so would not only be contrary to the intent of the rule, but would be an unfair demerit mark against their employment record. In Award 977 (Referee I. L. Sharfman) this Division said:

"The evidence of record supports the following conclusions: that Rule 33 of the agreement, dealing with investigation incident to disciplinary action on the part of the carrier, is not applicable to the circumstances of this proceeding; * * *."

This principle has been followed by the First Division in Awards 4845 and 4846 (Referee Swacker). It is a sound principle and should be applied here.

In the first paragraph of their statement of claim, the employes say that the disqualification of the claimant "was not authorized by the terms of the current agreement." That contention was also very effectively disposed of by this Division in Award 977, wherein it was held that in ordering a physical examination, which was not provided for by the agreement, the carrier acted reasonably and that whether the claimant had a right to reinstatement depended upon his physical fitness to perform his duties.

For the reasons given, carrier submits that it was fully justified in removing this employe from active service.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Here, as in Docket 1230, Award 1308, the claimant was requested to report for a medical examination when there was no apparent reason, other than advanced age, for any alleged change in physical condition. There is no conclusive proof that her work performance was hampered by physical defects. A plausible basis for a medical investigation, therefore, is not established.

Curiously, the doctor's report revealed nothing except "obesity." Since there is no indication that this condition was of recent origin, its significance as a disqualifying factor is materially lessened. That the claimant's dismissal was prolonged for almost five months after the date of examination reflects, to some extent, on the carrier's opinion of the severity of the impairment.

AWARD

That Sally Fite's service rights were unjustly terminated on September 22, 1947, and she should be reinstated with seniority rights unimpaired, and remunerated for all time lost as a result of the carrier's action, with deductions for wages, if any, earned in any other employment during the period for which she is awarded back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 7th day of March, 1949.