

Award No. 1308

Docket No. 1230

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 EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)**

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

DISPUTE: CLAIM OF EMPLOYEES: 1. That the termination of the service rights of Coach Cleaner George Fite at the close of his shift on September 30, 1947, was not authorized by the terms of 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.

EMPLOYEES' STATEMENT OF FACTS: That George Fite, hereinafter referred to as the claimant, was employed by the carrier at Nashville Terminals, Nashville, Tennessee, during the hours of 7 A. M. to 3 P. M. with a seniority dating as a coach cleaner as of May 8, 1897.

The carrier advised this claimant on September 5, 1947, that he would be retired from service because it was assumed that he could not perform his duties properly, effective at 3 P. M. September 30, 1947, and which is substantially affirmed by copy of the submitted letter identified as Exhibit A, addressed to the claimant on September 5, 1947, by C. A. Ellner, master mechanic.

The claimant, on September 16 and 18, 1947, was examined by his physicians, Drs. O. L. Hambrick and J. L. B. Forrester, and a copy of their findings of the physical condition of the claimant are submitted, respectively identified as Exhibits B and B-1. Consequently, the claimant reported for assuming his regular duties at 7 A. M., October 1, 1947, but the carrier would not permit him to do so.

The agreement effective September 1, 1943, is controlling.

POSITION OF EMPLOYEES: It is submitted that there is nothing expressed or implied in the aforesaid agreement which authorized the carrier to arbitrarily terminate the service rights of this claimant, and that no such right as the carrier exercised in the submitted Exhibit A was derived from any written or verbal understanding consummated between the carrier and System Federation No. 91, either prior or subsequent to September 1, 1943, the effective date of the current controlling agreement, which was made in pursuance of the Amended Railway Labor Act.

carrier submits that, in the complete absence of any finding as to this man's physical condition and with no indication that the doctor had any information as to the physical requirements necessary for the position Mr. Fite held, no weight should be given Dr. Hambrick's conclusion that Mr. Fite was "physically able to do manual labor for an indefinite period", in the face of the affirmative findings of Drs. Eve and Forrester.

In handling the matter on the property, the organization took the position that Mr. 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."

Mr. 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 his duties, he 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 his duties and, therefore, is not a case to which Rule 33 would be applicable. Carrier has never used the discipline rule of an agreement as a basis for disqualification of any employe because of his physical disability. To do so would not only be contrary to the intent of the rule, but would be an unfair demerit mark against his employment record.

In support of this contention, carrier would respectfully refer the Board to its Award 977, with Dr. I. L. Sharfman as referee, and for ready reference quotes the following excerpt from the Board's findings in that case:

"The evidence of record supports the following conclusions: that Rule 33 of the agreement, dealing with investigations incident to disciplinary action on the part of the carrier, is not applicable to the circumstances of this proceeding; that in ordering the physical examination involved in this case the carrier acted reasonably and in good faith, because of the demands of safety, and did not violate the agreement; . . .".

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.

The evidence disputing Fite's ability to properly perform his assigned duties of inside coach cleaner is meager and lacks conviction. A medical examination was requested even though Fite had not experienced serious illness, injury, or accident, or been otherwise exposed to circumstances which would reasonably indicate a change in physical condition. There were no outward signs of physical impairment other than those which normally accompany a long life. In the absence of such factors, advanced age alone neither proved that his continued employment would constitute an extraordinary risk nor did it justify an inquiry into his state of health. The demand for a physical examination was not merited, and it was improper to use Dr. Eve's report as the basis for dispensing with Fite's services.

AWARD

That George Fite's service rights were unjustly terminated on September 30, 1947, and he 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 he 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.