

Award No. 839
Docket No. 770
2-D&RGW-CM-'42

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee I. L. Sharfman when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 10, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (CARMEN)**

**THE DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY**

DISPUTE: CLAIM OF EMPLOYES: That under the controlling agreement and Rule 32 (a) and (b) thereof:

(a) On November 11, 1941, Carman Helper John Freeling, Jr., was improperly held out of service until November 19, 1941, when it was wrongly decided he would not be reemployed.

(b) Carman Helper John Freeling, Jr., be reinstated with seniority rights unimpaired and paid for all time lost retroactive to and including November 11, 1941.

EMPLOYES' STATEMENT OF FACTS: Since May 14, 1941 John Freeling, Jr., has been regularly employed by the carrier at Denver, Colorado Burnham shops. For some time prior to November 11, 1941, his hours of employment were from 7:30 A. M. to 4:00 P. M.

On the night of October 27, 1941, this claimant became involved in domestic difficulties and hospitalization at the Colorado General Hospital until November 10, 1941, when he was discharged without hesitation.

On November 11, 1941, the claimant reported for regular duty, but was denied employment until he had been examined by the company doctor.

The claimant complied with the Assistant General Car Foreman Thomas' instructions, reported to chief surgeon and was shifted from one doctor to another, from day to day and back to the chief surgeon, Dr. Curfman, informed said claimant on November 19, 1941, that he would have to be taken out of service for alleged nervousness.

The carrier, since November 19, 1941 and up to the present time, has refused on more than one occasion to reinstate the claimant.

POSITION OF EMPLOYES: This instant claim resulted from the carrier taking sides in a controversy that arose within the family of this employe and which should have been no concern of theirs.

On the night of October 27, 1941, domestic difficulties developed within the family of this employe, resulting in charges of infidelity and counter

Considerable discussion was had with the general chairman also local chairman at Denver, in connection with this case. The last conference and discussion took place on February 4, 1942, at which time the carrier read to the employe representatives the information contained in the carrier's exhibits.

Employes' representatives were also advised during a conference that although Mr. Freeling's mental condition made it necessary to remove him from service at this time, he was not permanently discharged, and his return to service depended upon an improvement in his mental condition to such an extent that Chief Surgeon could authorize his return. The representatives of the employes were also advised under date of February 11, 1942, that while the carrier was still of the opinion that Mr. Freeling should not be returned to service, it was willing to make arrangements to have the medical department again examine Mr. Freeling and, if, again, in the opinion of the medical department he should not be returned to service, to have Mr. Freeling submit a report from his private physician, if these two doctors disagreed as to his condition, to have an independent physician chosen by the organization and management to make an examination of Mr. Freeling, the expense of the independent physician to be divided equally. Representatives of the employes under date of February 19, 1942, declined to enter into this arrangement.

As result of the carrier not permitting Mr. Freeling to return to service, they claim Rule 32 (a) and (b) of the current agreement reading:

"(a) An employe who has been in the service more than sixty (60) days, or whose application for service has been formally approved, shall not be disciplined or dismissed without an investigation. He may, however, for very serious offenses, be held out of service pending such investigation. The investigation shall be held as promptly as possible but within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within ten (10) days after completion of the investigation. The investigation will be held at such time as not to cause the employe to lose rest or time, whenever possible to do so.

(b) At a reasonable time prior to the hearing, such employe shall be apprised of the precise charges against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and be represented by his duly authorized representative."

The carrier emphatically denies that in this case it violated the provisions of Rule 32 (a) and (b) for the reason that Mr. Freeling has not been disciplined or dismissed. He is being held out of service until such time as medical department feels that his mental condition has improved to the point where he can perform the duties of a carman helper without being a burden to himself and a potential hazard to his fellow workmen. To have complied with the provisions of Rule 33 (a) and (b) in this particular case and held an investigation would not have developed anything helpful or of value.

The carrier contends, and the exhibits support its contentions, that the diagnosis of Schizophrenic reaction with paranoid trends, and the further diagnosis that Mr. Freeling is considered delusional and potentially dangerous by two different nationally known doctors, justified its action in not permitting Freeling to return to 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 of record supports the following conclusions that in the circumstances of this proceeding it was neither unreasonable nor beyond the authority of the carrier to require a physical examination of the claimant; that the examination was made in good faith on behalf of the carrier, in the interest of safety; that upon the adverse report of the carrier's physician, it was not in violation of any rule of the agreement to hold the claimant out of service pending such improvement in his condition as would justify his return; and that the proposal of the carrier which was rejected by the employes—that "the Medical Department again examine Mr. Freeling, and if, again, in the opinion of the Medical Department he should not be returned to service, to have Mr. Freeling submit a report from his private physician, (and) if these two doctors disagreed as to his condition, to have an independent physician chosen by the organization and management to make an examination of Mr. Freeling, the expense of the independent physician to be divided equally"—constitute a fair and reasonable method of adjusting this dispute.

AWARD

Claim remanded for settlement by the parties in conformity with above proposal of the carrier.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 13th day of October, 1942.