

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Henry J. Tilford, Referee)

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

BURLINGTON-ROCK ISLAND RAILROAD COMPANY

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

- (1) That Miss Barbara Kessner, Clerk, General Office, Houston, Texas, be restored to service with seniority rights intact and her record cleared.
- (2) That Miss Barbara Kessner be compensated for all time lost subsequent to February 8, 1944 on which date she was removed from service.

OPINION OF BOARD: The facts surrounding Miss Kessner's dismissal from Carrier's service are as follows:

Claimant, a Clerk of about two years' experience (seniority date April 23, 1942) in Carrier's Auditing Department, was absent from service during the period beginning Wednesday, February 9 and ending Wednesday, February 16, 1944. On Tuesday, February 15, 1944, Carrier's Auditor wrote Claimant as follows:

"You have been absent from duty beginning February 9, 1944, account alleged sickness, and you have made conflicting statements both in regard to the nature of your ailment and the treatment thereof. You were visited by our Company Physician on February 11, 1944 and he did not find any illness or treatment to be prescribed.

"You are, therefore, relieved from further service with this Company as of the close of business February 8, 1944. Enclosed you will find pay check for service to and including February 8, together with Form W-2 showing Income Tax withheld from wages during year 1944 to date."

On February 17, Claimant requested a formal investigation as provided by Rule 24 of the Agreement and, pursuant to a request of Employees' General Chairman for a postponement, the investigation was held on March 2, 1944, a transcript of which has been filed as an Exhibit by both parties.

Petitioner's contentions are thus stated in the record:

"First—That Miss Kessner committed no offense against the Management that would be detrimental to their best interest and efficiency.

Second—That the alleged offense charged against Miss Kessner was, by the Carrier's own admission, committed after she had been removed from the pay roll and seniority roster of the Carrier.

Third—That the testimony of Mr. McAlister contained in Exhibit 'A' is irrelevant and immaterial and that no doctor can diagnose a case simply by looking at a patient."

Rule 48—Sick Leave, is as follows:

"Where the work of an employe is kept up by other employes without cost to the carrier, a clerk who has been in continuous service of the carrier one year and less than two years, will not have deduction made from his pay for time absent on account of a bona fide case of sickness until he has been absent six working days in the calendar year; a clerk who has been in continuous service two years and less than three years, nine working days; a clerk who has been in continuous service three years or longer, twelve working days. Deductions will be made beyond the time allowance specified above.

"The employing officer must be satisfied that the sickness is bona fide, and that no additional expense to the Carrier is involved. Satisfactory evidence as to sickness in the form of a certificate from a reputable physician, preferably a company physician, will be required in case of doubt.

"The above limits of sick leave may be extended in individual meritorious cases and under the conditions specified, but only the agreement of the representatives of the Carrier and of the Employes."

And the importance of the rule in the confronting case is that its second paragraph recognizes Carrier's right to inquire into the nature of an employe's continued absence from service, particularly when sickness is claimed as the reason for such absence.

The medical testimony relied on by the Carrier as substantiating its charge that Claimant was not sick is that given by Dr. F. E. McAlister. Since its substance is contained in an affidavit filed prior to the oral hearing, we quote the affidavit in full:

"To Whom It May Concern:

On Thursday night, February 10, 1944, Miss Barbara Kessner called me on the telephone at my residence and left her number with my daughter. When I got in from making a call, I called her. She asked me to say that I had seen her when I had not, to keep down any trouble that might arise at the office. I told her that I would have to see her. She said she would come to my office the next day. I told her that if she was not able to come to see me, I would come to see her. She said she would go ahead and tell them that I had seen her. The impression that I got from what she said was that she was afraid something would happen to her job.

She called me on Friday morning, February 11, at my office, and said she was nervous, which was brought on by overwork. I went to see her that evening and she said she had taken some enemas and they had caused her bowels to run off, and that she had taken these enemas because she had not had a bowel movement for the last six days she worked.

I talked with her for about twenty minutes and could not find any need for medical treatment, and she agreed with me that she did not need any treatment. I left without prescribing any treatment.

The taking of enemas should not cause any protracted trouble of any kind. It is my impression that she had no organic trouble."

Signed F. E. McAlister
F. E. McAlister, M.D."

Claimant denied that she had asked Dr. McAlister if she could say to the officers of the Carrier that she had seen him with respect to her illness, and

testified that on the contrary he said to her during the telephone conversation on the night of February 10, 1944, that she could tell her employer that she had consulted with him. She further testified that when he called on her the next day she went into detail about her condition. She denied that she told him, as testified by him, that her bowels had been running off, and described her actual condition as follows:

"... I have had stomach trouble for a long time and the nature of my illness was acute constipation, I suppose, impacted colon. I took some oil and some enemas on the advice of an elderly lady friend of the family, and I wanted to engage a stomach specialist until Mr. Higgins called and I did not know what they were trying to do and I had not intended to engage Dr. McAlister for the trouble. I thought I could treat myself and get Mr. Haggart's permission later to go through the Clinic for I have had trouble for more than a year. Dr. McAlister has never prescribed anything for my stomach since I have been ill."

Weighing her testimony against that of Dr. McAlister, we are not willing to say that Claimant did not believe herself to be ill; and if the decision of this case turned solely upon whether she did or did not so believe, we would be inclined to the opinion that the Carrier's action in dismissing her was unjustified, since a person may be indisposed to the degree that rest is needed without that fact being apparent to a physician.

But the Carrier's charge is broader than a mere negation of Claimant's assertion that she was sick. It includes an element of moral turpitude, in that she was accused of making conflicting statements, both in regard to the nature of her ailment and the treatment hereof. In fact, the Carrier takes the position that she deliberately falsified. In support of this accusation the Carrier proved, without contradiction from Claimant or otherwise, that shortly before her absence she had inquired as to how many days of sick leave she had coming to her, and had made the statement that each employe was entitled to so many days sick leave, and that she was going to have hers, and would be foolish if she did not get it. The Carrier further proved that in telephone conversations with office employes during the period of her absence, she stated among other things:

(Wednesday, February 9th)

That she had eaten something that had made her sick, and that she was going to have some X-Ray pictures taken.

(Thursday, February 10th)

That she had been out to Hermann Hospital; and that she was taking some kind of treatment.

(Friday, February 11th)

That she had been to the Houston Clinic to see the Company doctor, and that the doctor had told her that she was rather sick and should stay at home until at least Monday.

It was also shown that on Tuesday, February 15th the Chief Clerk to the Auditor was unable to locate her at her home, or elsewhere.

In view of the fact that Claimant did not visit a hospital or have X-Ray pictures taken, or deny that she made the statements attributed to her by the Carrier's employes, we cannot say that the Carrier failed to substantiate its charges, or that it acted in bad faith, arbitrarily, capriciously, or upon a fundamentally wrong basis. (See Award 2866.)

Petitioner's representative contends that under a proper construction of Rule 48, the inability of an employe, absent on account of illness and entitled to sick leave, to furnish a physician's certificate as to his illness when re-

quested to do so, is not a dischargable offense, and that in such a case the utmost the Carrier could do would be to make deductions from the employe's pay for the time absent. We would be inclined to agree with this construction of the rule if the only charge against the employe was his failure to procure the certificate. In such a case any other interpretation of the rule would be exceedingly harsh, since the employe might have genuinely believed that he was ill and yet been unable to convince a physician of the fact, especially where the symptoms were entirely subjective. But such a contention is clearly irrelevant in the confronting case. As before pointed out, the Claimant was dismissed from service, not because of her inability to furnish a certificate as to her illness, but because of her misstatements in regard to a material matter concerning which the Carrier had the right to demand the truth.

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 Carrier did not violate the provisions of the current Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 4th day of May, 1945.