

Award No. 5334
Docket No. CL-5360

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee.

PARTIES TO DISPUTE:

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerks' Agreement:

(1) When on January 11, 1950 it refused to grant a six months leave of absence to Mrs. Harriet E. Mariani, a Key Punch Operator in the office of the Auditor of Disbursements, and, when on Jan. 31, 1950 the Carrier again refused to grant a 90 day leave of absence to Mrs. Mariani; both leaves of absence being requested account pregnancy and supported by Doctor's certificate furnished to the Carrier.

(2) When on March 22, 1950 following a formal investigation on a charge that Mrs. Mariani failed to protect her assignment, the Carrier dismissed Mrs. Mariani from service.

(3) When on May 11, 1950 the Carrier refused to allow Mrs. Mariani to return to her position after she had been off account of child-birth.

(4) That the Carrier now be required to right the wrongful discharge of Mrs. Mariani by re-instating her to service with all rights unimpaired and, to pay her for all wages lost from May 15th, 1950 (the day she was ready to return to service) until she is restored to her position as Key Punch Operator.

CARRIER'S STATEMENT OF FACTS: On June 30, 1950 Representatives of the Organization and the Carrier signed a Joint Statement of Facts which is hereby quoted in full and is now submitted as the Carrier's Statement of Facts in this case:

On December 29, 1949 Mrs. Harriet E. Mariani, Key Punch Operator in the Auditor of Disbursements (Car Accounts) made written request for leave of absence as follows:

Portland, Oregon
December 29, 1949

Mr. H. L. Kendall
Auditor Disbursements
SP&S Railway Co.
Portland, Oregon.

Dear Sir:

Please consider my request for a leave of absence as covered by Article V, Rule 46.

3. The Brotherhood contends there is no dispute before your Honorable Board on the question set forth in Carrier's ex parte submission under "Statement of Claim", Item 2, reading:

"When on March 22, 1950 following a formal investigation on a charge that Mrs. Mariani failed to protect her assignment, the Carrier dismissed Mrs. Mariani from service."

for the reason, as heretofore stated, that it is a mere subterfuge, devised by the Carrier for ulterior motives.

4. It might here be appropriately stated, as information to the Board, that since receipt of Mr. Tummon's letter dated September 24, 1950, advising of Carrier's intention to file ex parte submission involving the claim of Mrs. Mariani, we approached the Management suggesting the withdrawal of their notice in view of the fact that our formal notice predated their notice by some seven (7) days (Brotherhood's notice September 13—Carrier's notice September 20). The Carrier, however, expressed unwillingness to do so.

(Exhibits not reproduced.)

OPINION OF BOARD: The Board is faced with a rather anomalous situation in this docket in that the Carrier has taken the initiative in bringing this claim before this Board. The Employees have submitted a claim in Docket CL-5361, disposed of by Award No. 5335, which deals to some extent with the same subject matter but disregards completely the matter of an investigation held by Carrier as a result of which the claimant, Mrs. Mariani, was discharged from service.

In Docket CL-5361 (Award No. 5335) the Carrier has stated that its submission in this docket is by reference made a part of its submission in that docket. Accordingly we shall consider the record in both dockets in coming to a decision in this.

By its action in submitting the claim as it reads in this docket before the Board for adjudication, the Carrier has put in issue the question of the validity of the discharge of the claimant. The claimant, Mrs. Htrrier E. Mariani, on December 29, 1949 had requested a six months' leave of absence beginning February 1, 1950 because of her pregnancy. That was refused. On January 24, 1950 she made another request accompanied by a certificate from her physician asking for a ninety day leave of absence. That also was refused and subsequently handled by the General Chairman on higher steps in the grievance process and denied. On February 15, 1950 Mrs. Mariani informed her immediate superior that effective February 16, 1950, it was necessary that she go on leave. She did not report for work on the 16th. In accordance with the discipline rule she was notified to appear for formal investigation which was finally held on March 14, 1950, and as a result of which she was discharged for violation of Operating Rule 701 (absent from duty without proper authority).

On the basis of the facts of record herein, we think the Carrier's action in discharging claimant because of an alleged violation of Rule 701 was arbitrary in the extreme. In a situation such as this Operating Rule 701 presupposes a physical ability to perform the duties of the position, excluding, of course, a physical disability brought on by indulgence in intoxicants or drugs. The employee is obliged, of course, to make every reasonable effort to inform the Carrier of such disability so arrangements can be made to protect the work. Mrs. Mariani was about seven months' pregnant at the time this alleged violation took place and had furnished a medical certificate as to her condition. She notified her superior the day before that it would be necessary for her to be on leave of absence on the date she was charged with being absent without proper authority. At the hearing it was testified that the physical disability brought on by her pregnancy prevented her from performing the duties of her position. Appeals from this decision were duly

prosecuted and denied. Claimant presented herself ready to report for service within a reasonable time after the birth of her child.

The facts clearly warrant a finding that Carrier violated the Agreement and claimant should be restored to service with all rights unimpaired and reimbursed for wage loss suffered from May 15, 1950.

In view of the finding above, the other issue presented in this docket becomes academic.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated the Agreement.

AWARD

Claim sustained as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of April, 1951.