Award No. 676
Docket No. CL-700

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

W. H. Spencer, Referee

PARTIES TO DISPUTE:

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

THE DENVER & RIO GRANDE WESTERN RAILROAD CO.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES.

STATEMENT OF CLAIM: "Claim of System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the name of Miss Ebba Christensen be added to the current Disbursements Department Seniority Roster, Denver, Colorado and that all rights accruing to her under rule of the agreement be restored."

STATEMENT OF FACTS: Miss Ebba Christensen, stenographer-clerk, in the Disbursements Department, General Office, Denver, Colorado, entered the service of the Denver & Rio Grande Western Railroad, November 20th, 1917. Miss Christensen became ill in May 1934 and since that time has not worked, and her name was omitted from the 1937 Seniority Roster.

The request of the employes that her name and date be reinstated on the roster and she be furnished annual transportation in accordance with the practice in effect on the Denver & Rio Grande Western was denied by the carrier.

There is in evidence an agreement between the parties bearing effective date of February 1, 1926, and the following rules thereof read:

RULE 3.

"Seniority begins at the time the employes' pay starts in the seniority district and in the seniority class to which assigned, and will apply only when new positions are created, vacancies occur, positions abolished or reduction of forces.

"When two or more employes enter upon their duties at the same hour on the same day, employing officer shall at that time designate the respective rank of such employes."

RULE 21.

"A seniority roster of all employes in each seniority district, showing name and proper dating, will be posted in each office in the district, accessible to all employes affected. The rosters will be revised and posted in January of each year, and will be open to protest for a period of sixty (60) days from date of posting. Upon presentation of proof of error by an employe or his representative, such error

"What the carrier said in its reply of August 31, 1936, to the claim covered by Docket Case CL-380 with respect to the manner in which it treated Miss Christensen as well as her physical condition is also pertinent to the claim now before the Board.

"Since the claim covered by Award No. 344 was heard September 24, 1936, Miss Christensen, whose home is in Salt Lake City, has not consulted our surgeons with respect to her physical condition as often as she did prior thereto. Our records indicate she called on Dr. Lindem, one of our surgeons at Salt Lake, the first part of the year 1937 and he again reported that in his judgment Miss Christensen would never be able to resume her duties as a stenographer.

"On July 15, 1937, Miss Christensen by letter requested the General Auditor to furnish her with trip transportation from Salt Lake City to Denver and return in order that she might undergo a physical examination by our Medical Departmen. Her request was granted and on July 30, 1937 after her arrival in Denver, she was given a thorough examination by our Chief Surgeon who reported as follow:

> 'The diagnosis is organic heart disease, aortic and mitral endocarditis with evidence of broken compensation. She is totally and permanently incapacitated for duty.'

"During discussion of this case with the organization they contended that in removing Miss Christensen's name from the seniority roster the carrier violated that part of Rule 29 which reads:

> 'An employe who has been in the service more than 90 days or whose application has been formally approved shall not be disciplined or dismissed without an investigation.'

"The Carrier did not discipline Miss Christensen, neither did it dismiss her. Neither is it responsible for her physical condition. The Carrier contends, however, as it did in its reply to Docket CL-380, and which contention is supported by the physical examination given this lady by our Chief Surgeon on July 30, 1937, that Miss Christensen is permanently physically incapacitated for duty, and as result thereof it was justified in permanently removing her name from the seniority roster of the Disbursements Department.

"Attention is directed to the fact that at no time since her initial illness in May 1934 has Miss Christensen advised that in her own opinion she was physically able to resume duty."

OPINION OF BOARD: The facts of this controversy are not seriously in dispute. The evidence of record clearly indicates that the claimant is permanently incapacitated to resume the character of work to which her seniority entitles her in the district in which her seniority rating has been earned. The petitioner, it is true, insists that Miss Christensen may at some future time so far recover that she can return to her former position. In the face of the evidence of record, however, this is mere speculation; the petitioner, indeed does not deny that the eventuality is extremely remote. The controversy accordingly presents a single issue—whether the carrier in the circumstances established by the record was justified under the agreement between the parties in permanently removing the claimant's name from the seniority roster in question.

The petitioner, in support of its position that the name of Miss Christensen should be restored to the seniority roster in question, relies upon Rule 29 dealing with discipline and grievances, and upon Rule 41 dealing with leaves of absence.

The Division is of the opinion that the claim cannot be sustained under Rule 29. It seems clear that this rule was conceived and adopted to protect an employee against arbitrary and capricious conduct on the part of his employer in discipline cases by guaranteeing a fair hearing to him in such cases. It was asserted by the carrier and not denied by the petitioner that this controversy is the first in which the rule in question has been invoked in a case comparable to the one under consideration. While this fact is not conclusive, it is strong evidence of the intent of the framers of the rule and of those who have administered it since its adoption.

But more significant is the fact that the rule itself bears internal evidence of its meaning and purpose. It declares that an established employee shall not be "disciplined or dismissed" without investigation. The terms "disciplined" and "dismissed", although expressed disjunctively, must be taken to describe the same situation—a situation in which the carrier disciplines or dismisses an employee because of his alleged misconduct.

The rule under consideration contains other significant statements—that the employee must be apprised of the charges made against him, that he shall have reasonable opportunity to insure the presence of necessary witnesses, and that he shall have the right to be represented by counsel of his own choice. These statements all bear eloquent testimony in support of the conclusion that Rule 29 is a discipline rule and has no application to a dispute like the one at hand.

The carrier in the present controversy most assuredly did not discipline or punish the employee by the action that it took. The assertion may seem legalistic, but the fact is that the employer did not in reality dismiss the claimant from its employ; her physical condition removed Miss Christensen from the service. Following her removal from active service, the carrier granted the claimant sick leave for approximately two years, but retained her name on the appropriate seniority roster. The carrier, when it became convinced that she was permanently incapacitated to perform the type of work that she was entitled to claim, permanently removed the claimant's name from the seniority roster. It follows from this analysis that the claim under consideration must stand or fall upon Rule 41 which deals with leaves of absence.

Rule 41 provides among other things that "except for physical disability, or as provided in Rule 42 of this Article, leave of absence in excess of ninety (90) days in any calendar year shall not be granted unless by agreement between Management and the duly accredited representative of the employees." The petitioner argues that this portion of Rule 41, fairly construed, means that the carrier is obligated to grant indefinite leaves of absence in situations in which employees are unable to work because of physical incapacity. It is the opinion of the Division that this interpretation of the language in question is not tenable.

The obvious purpose of the first paragraph of Rule 41 is to protect the seniority of employees who are able and willing to work continuously against an employer that might be tempted to grant indefinite leaves to employees who are unable or unwilling to work continuously. The rule therefore leaves little discretion in granting leaves to employees who are able to work but wish to be absent from the service for personal reasons. The rule grants the carrier full discretion in granting and extending sick leaves. In the opinion of the Division, however, the language of the rule does not impose upon the carrier a positive duty to extend sick leaves. The validity of this interpretation is attested by the second paragraph of Rule 41 which states that "the arbitrary refusal of a reasonable amount of leave of absence to employees when they can be spared, or failure to handle promptly cases involving sickness or business matters of serious importance, is an improper practice and may be handled as unjust treatment under this agreement." It should be noted in passing that the first clause of the provision just quoted

draws no distinction between requests for sick leave and other requests for leave.

The only question which remains for consideration is whether the carrier, within the meaning of the second paragraph of Rule 41, acted arbitrarily in its refusal to continue Miss Christensen on sick leave. The Division is of the opinion that, in view of the medical evidence of record, the carrier did not act arbitrarily, but, on the contrary, acted generously in dealing with the situation in dispute.

The conclusion which the Division reaches in this dispute is supported by its decision in Award No. 525 in which Referee Millard stated that "under the circumstances and from the evidence submitted the Board finds no basis for any attempt to interfere with the action of the Carrier."

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing theron, 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 action taken by the carrier in removing the claimant's name from the seniority roster was not in violation of the rules of the Agreement between the parties.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of July, 1938.