# Award No. 3990
# Docket No. CL-3986

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Fred L. Fox, Referee

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## PARTIES TO DISPUTE:

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

## GREAT NORTHERN RAILWAY COMPANY

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

(1) When on April 1, 1947, it refused to grant ninety (90) days leave of absence to Delores Tschida, Clerk in the Office of the Superintendent of Shops, Dale St., St. Paul, Minnesota.

(2) When, on April 8, 1947, it requested Delores Tschida to resign effective April 10, 1947 and later marked her records as "dismissed" without proper investigation.

(3) When, on July 1, 1947, it refused to allow employe Tschida to return to work after she had been off due to sickness.

(4) That the Carrier now be required to reinstate Delores Tschida, return her name to its proper place on the Seniority Roster and compensate her at the regular rate of pay of her position for July 1, 1947, and for each and every day thereafter on which she was held from service.

JOINT STATEMENT OF FACTS: On March 31, 1947, Delores Tschida, Clerk in the Dale St. Shops, Superintendent's Office, made written request for a ninety-day leave of absence to take effect April 1, 1947. She had previously made verbal request for a leave, submitting to Carrier a letter dated March 21, 1947, reading as follows:

"March 21, 1947

TO WHOM IT MAY CONCERN. This is to certify that Mrs. Leonard Tschida, 508 Sherburne, is under my care. I believe she needs a rest for a time.

Yours very truly,

/s/ N. J. Lilleberg, M.D.
1034 Lowry Medical Arts Bldg.
St. Paul 2, Minn."

Clerk Tschida, on April 2nd, wrote Superintendent Stoll asking that the effective date of leave of absence be changed to April 10, 1947, instead of

Also note Mr. Ovesen's statement in his quoted letter to Mrs. Margaret Nolden wherein he says, "This kind of a confinement is a direct violation of Rule 53 and I assure you that partiality or favoritism does not enter into it."

We direct attention to the language of your Board in Award 456, wherein you state: "If change in the agreement is desired, that result must be attained in the prescribed manner and through the proper channels."

In handling this case with the representatives of the employes it was directed to their attention that inasmuch as there had never been any question as to the intent and meaning of the last sentence of Rule 53 and that it had been common knowledge on the part of those who negotiated such rule, as evidenced by its consistent application thereafter, that it was placed in the agreement for the specific purpose of covering cases of pregnancy that a submission to your Board was improper and that if a change in the rule was desired, the procedure for the handling thereof was duly set forth in the Railway Labor Act and should be followed and, that if necessary to invoke the service of any tribunal, the matter was a proper one for handling by the United States Board of Mediation rather than the National Railroad Adjustment Board since the duties of the latter Board are limited to the interpretation of existing rules and that there is no authority vested in the National Railroad Adjustment Board for the negotiation of rules or the revision of existing ones.

The Carrier therefore holds:

1. That your Board cannot accept jurisdiction in this case inasmuch as it involves the revision of a rule in the agreement and not the interpretation of such rule.

2. That should your Board decide to accept jurisdiction the Carrier holds that it has clearly shown that it has not violated Rule 53 by refusing leave of absence to Mrs. Tschida to cover a period of pregnancy but that, to the contrary, to have granted same would have constituted a direct violation of the rule since it most certainly must be held that pregnancy prevents women from satisfactorily filling the requirements of the position occupied, since it requires them to vacate such positions entirely for varying periods of time.

3. The Carrier has shown conclusively that for a period of twenty-two years there has been no dispute between it and the representatives of the Employes as to the proper meaning and intent of Rule 53 and that, to the contrary, during that priod of time such representatives have insisted on the application still held to be proper by the Carrier.

The Carrier, therefore, holds that this claim should be dismissed by your Board based on lack of jurisdiction, or, if jurisdiction is assumed, that the claim of the Employes must be denied based on the language of the rule plus its unquestioned application heretofore since its negotiation over twenty-two years ago to the present.

(Exhibits not reproduced.)

**OPINION OF BOARD:** On April 1, 1947, the claimant, Delores Tschida, a married woman, was employed as a clerk in the office of Superintendent of Shops, in St. Paul, Minnesota. On March 31, 1947 she asked for a ninety day leave of absence, to take effect on the day following. Later changed to April 10, 1947, to enable her to take advantage of an eight day leave of absence with pay, to which she was entitled on her service record. She sought the ninety day leave on the ground of sickness, and furnished to the Carrier the certificate of a physician which stated that she was under his care, and "I believe she needs a rest for a time." In fact she was pregnant at the time she asked for the leave of absence, and was delivered of a child on May 27, following.

Claimant's request for a ninety day leave of absence was denied by the Superintendent under whom she worked, by letter of April 8, 1947. With

said letter he enclosed a form of resignation from the service, which he requested her to sign. She did not sign this proposed letter of resignation, but on April 10, entered upon what she now contends was the leave of absence to which she was entitled, under Rules Nos. 23 and 55 of the Agreement. On June 27, 1947, within the ninety day period of the leave of absence requested, she wrote the Superintendent advising him she would be able to return to work on July 1, following, to which letter the Superintendent, on July 1, 1947, made the following reply:

> "Received your letter of June 27th in which you stated you desired to return to your former position on July 1, 1947.
>
> This is to advise you that your request for a 90-day leave of absence was disapproved and you were so advised in my letter of April 8, file S-1351.
>
> Your record indicates that your service relation with this company was terminated on May 14, 1947 as per ruling contained in Rule 53 of the Clerks' Schedule dated Dec. 1, 1944."

This letter told the claimant, in effect, that she had been dismissed from the Carrier's service on May 14, 1947 under Rule 53 of the Clerks Agreement, which read as follows:

> "The pay of women employes, for the same class of work, shall be the same as that of men, and their working conditions shall be healthful and fitted to their needs. The laws enacted for the government of their employment must be observed. Women employes shall not be taken out of service by reason of their marriage so long as this does not prevent them from satisfactorily filling the requirements of the position occupied."

The act of the carrier in its unilateral act of terminating the claimant's employment relation, was, in effect, a dismissal. This action was taken without the investigation provided for in Rule 56 of the Agreement, the pertinent provisions of which read:

> "An employe who has been in service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation the employe, if he desires to be represented, may be accompanied and represented by the 'duly accredited representative,' as that term is defined in this Agreement. * * *"

Three separate and distinct questions are presented on this docket: (1) Should the carrier have disapproved claimant's request for a leave of absence; (2) Could the carrier terminate the employe relation of the claimant, under Rule 53, by reason of her pregnancy; and (3); assuming that it could do so, could it dismiss her from service without the investigation provided for in Rule 56 of the Agreement. These questions will be discussed in the order stated.

Rule 23 of the Agreement covers leaves of absence in general, and including leaves for physical disability. Sick leave is covered by Rule 56. By Rule 23 it is provided that the refusal of a reasonable amount of leave, when employes can be spared, or failure to promptly handle cases involving sickness or business matters of serious importance to employes, is an improper practice, and may be handled as unjust treatment under the Agreement. Also, in cases of illness the names of employes shall be continued on the seniority roster. Under this rule, and aside from the form and effect to be given to Rule 53, hereinafter considered, it would appear that claimant was entitled to a reasonable leave of absence, but, as to the extent thereof, we think the carrier was tested with a wide discretion, which, of course, it could not abuse to the prejudice of the employe. We think, however, that discussion of this point is academic, because it appears that, in fact, a leave of absence was sought by claimant on account of her pregnancy, and that her condition of health was due to that fact. If the carrier, under Rule 53,

could dismiss claimant when her state of pregnancy was such as to prevent her from satisfactorily filling the requirements of her position, then the carrier's refusal to grant her the leave of absence she sought was justified; otherwise it was a matter in which, after investigation, the carrier was tested with a reasonable discretion.

This brings us to Rule 53, which has been quoted in full. We are only concerned with the last sentence thereof which provides that "Women employes shall not be taken out of service by reason of their marriage so long as this does not prevent them from satisfactorily filling the requirements of the position occupied." That part of the rule which says that they "shall not be taken out of service by reason of their marriage," has the support of this Division. See Awards Nos. 2217 and 2636. But the remainder of the sentence "so long as this does not prevent them from satisfactorily filling the requirements of the position occupied," operates as a limitation of that part of the rule which prohibits being taken out of service on account of marriage alone, and, we think, was intended to mean that when, as the result of marriage, a woman is no longer able to satisfactorily perform the service for which she is employed, the employer has the right, under Rule 53, to dismiss her. As is well known, pregnancy is the usual and normal result of marriage, and at some stage of pregnancy, depending on general health and other factors, a woman becomes unable to satisfactorily perform any work of the nature of that here involved. It seems clear to us that those who framed Rule 53 must have had these facts in mind. The rule must have been written with the facts of life, as they relate to women and marriage, in mind. Ordinary sick leave, for both men and women, is covered by other rules of the Agreement, and, as we view the matter, Rule 53 is a rule intended to cover the employment of all women, as to pay and working conditions, with a special provision covering marriage, and its probable consequences. We are of the opinion, therefore, that under Rule 53, the carrier, by the observance and application of other rules of the Agreement, could have dismissed the claimant from its employment when she became unable to satisfactorily perform her work, and, necessarily, the carrier could determine when that point was reached, though required to deal fairly with the employe at all times.

We reach this conclusion on Rule 53 as it is written. We think it was intended, under Rule 71, to supersede all previous agreements, rulings or interpretations in conflict therewith, and we are not influenced by the provisions of former rules, or their interpretations, and for this reason will not discuss at length the several rules which have been adopted on the subject of woman employment and their marriage, beginning with Rule 73 of the Agreement effective January 1, 1920, and subsequently modified by Rule 65 of the 1925 Agreement. This rule was then interpreted as not covering cases of pregnancy. Then in 1938 the same rule was amended so that on the marriage of a woman employe she forfeited her seniority rights and could be relieved from the service. Finally Rule 53 of the present Agreement was made, under which marriage alone does not warrant dismissal, and, as we view it, represents a compromise, and which excludes consideration of all that occurred in that connection prior to the date the final Rule was adopted.

These considerations would seem to call for a denial of the claim, but for the fact that claimant was dismissed from service without being notified of any charge against her, or given that investigation and hearing thereon provided by Rule 56 of the Agreement. An employe cannot be deprived of his or her job, with the seniority attendant thereto, without investigation and opportunity to be heard, with the aid of counsel or other representative, and, of course, on charges clearly defined. This procedure was not followed in this case. Claimant was dismissed without any charge filed against her, and without any investigation to which she was a party, or in which she was represented. Her attempted dismissal was totally ineffective, and she remained an employe, and was entitled to return to work on July 1, 1947. The passage of time prevents any disciplinary action on the part of the carrier for claimant's absence from work without leave. Therefore, the action of the carrier in dismissing her without investigation leaves her just

where she was prior to April 1, 1947, and on that ground above claims 3 and 4 will be sustained. Claims 1 and 2 are denied in principle.

**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

There was no violation of the Agreement in disapproving claimant's application for a leave of absence for 90 days, or in requesting her resignation.

The Agreement was violated when claimant was dismissed from service by the carrier without being given the investigation provided for in Rule 56 of the current agreement.

AWARD

Claims (1 and 2) denied in principle.

Claims (3 and 4) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

**Dated at Chicago, Illinois, this 15th day of July, 1948.**