

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33378
Docket No. MW-33325
99-3-96-3-829**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Vehicle Operator J. E. Barosky for alleged conduct unbecoming a Conrail employee on November 13, 1993 at the South Plainfield Track Office was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System Docket MW-3957-D).

(2) The Claimant shall be afforded the remedy prescribed in Rule 27, Section 4.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute were given due notice of hearing thereon.

The Claimant entered the Carrier's service and established seniority as a Trackman on May 24, 1976. Before his dismissal from the service of the Carrier on June 28, 1995, the Claimant had been employed as a Vehicle Operator in a maintenance track gang that was assigned to the Carrier's Philadelphia Division.

The events which led to the dismissal of the Claimant occurred on November 24, 1993 when he along with other employees were at the South Plainfield, New Jersey headquarters to attend a luncheon and safety meeting. Track Supervisor Stephen L. Botsford was in his office with John Muller, Customer Service Representative.

While Botsford and Muller were in the office, the Claimant appeared at the entrance to the office and said that he had a doctor's appointment that afternoon. Botsford said to the Claimant in effect, that it was not the most appropriate time to let him know about the doctor's appointment since he was just about ready to conduct a safety meeting. Botsford told the Claimant that he could have given him advance notice of the doctor's appointment. The Claimant replied that he told him about the scheduled appointment the previous night.

During the previous night the gang changed a broken rail. Botsford told the Claimant that he did not recall such a conversation "at the broken rail."

The Claimant then started "hollering" and telling Botsford that he was "full of s---." He proceeded to the locker room where he began "punching the lockers . . . and . . . cursing". Botsford followed the Claimant into the locker room and told the Claimant "to start acting like a human being,"

The Claimant began "screaming" at Botsford and told him that he was a big asshole and that he did not know what he was doing. Botsford instructed the Claimant "to try to control his temper".

The Claimant responded by saying ". . . if you don't let me go to see my doctor, I'm going to get my AK-47 and I'm going to kill you." After Botsford said "you really wouldn't want to do that, would you, the Claimant repeated that "he would kill" him.

Botsford told the Claimant that he could remove him from service for "threatening to kill a Conrail Official", and the Claimant replied, "go ahead, take me

out of service. I don't f - - - - - care." The Claimant also stated to Botsford that he would contact the Division Engineer and have him [Botsford] pulled out of service.

Botsford repeated to the Claimant that he could be taken out of service for his conduct. Again the Claimant said he "didn't f - - - - - care" and Botsford told him to "hold that thought for a moment."

Botsford then entered his office and requested Muller who continued to remain there, to step out of the office to witness that he was taking the Claimant out of service. When the Claimant saw Muller step out of the office, the Claimant ran into the bathroom to hide.

Shortly thereafter, Botsford proceeded to the lunchroom to conduct the safety meeting. The Claimant then entered the lunchroom and started to scream while stating that if Botsford did not permit him to leave for his doctor's appointment he would not be able to operate the boom truck on Monday.

Since Botsford did not want the Claimant to be at work, and feeling intimidated and threatened, he permitted the Claimant to leave for his doctor's appointment. Upon telling the Claimant to have a better attitude when he came back to work the following week, Botsford said the Claimant began "screaming again," after which he left.

Later that day, at about 6:35 P.M. when Botsford was in his office, and alone, the Claimant walked into his office. The Claimant apologized for his actions and related to Botsford the problems that he was having during the past few weeks. Among the problems which he related to Botsford was that on one (1) occasion he sat in "his car playing Russian roulette with a pistol." While talking to Botsford, the Claimant "had a total red face."

The Claimant then asked Botsford if he would shake his hand. Although he did not wish to do so, Botsford, who was intimidated by the Claimant, felt it was in his best interest to do so. After he shook the Claimant's hand, the Claimant left the office. Botsford said that as soon as the Claimant left, he "jumped" into his "car and . . . took off."

The Organization raises a threshold issue which must be resolved before addressing the merits. The findings which have been set forth, are based upon evidence

presented at a hearing that was held in absentia. The Organization claims that the hearing in absentia violated Rule 27, Section 1 (d) which in relevant part, provides as follows:

"A hearing may be postponed for a valid reason at the request of the Company, the employee or the employee's union representative."

The Claimant was taken out of service by the Carrier on November 29, 1993. On December 3, 1993, a Notice of Hearing was sent to the Claimant which charged him with the offense of "conduct unbecoming a Conrail employee on November 24, 1993 . . . in that he allegedly became disruptive and threatened to kill Supervisor . . . Botsford." The notice of hearing advised the Claimant that the hearing was scheduled for December 14, 1993.

The Organization requested a postponement and the hearing was rescheduled for January 16, 1994. There followed several postponements, including a postponement requested by the Organization, from January 16 to January 19, 1994.

By certified letter dated May 24, 1995 the Carrier advised the Claimant that the hearing was re-scheduled for June 14, 1995. On the morning of June 14, 1995 the Carrier was advised by the Organization that the Claimant had a scheduled medical appointment. The request for a postponement was denied by the Carrier.

Based upon the record, the Board finds that the Carrier did not violate Rule 27 (d) because of its failure to postpone the hearing on June 14, 1995, and conducting the hearing on that day, in absentia.

By signing the certified mail receipt on June 9, 1995, the Claimant received proper notice that the hearing was scheduled for June 14, 1995. The Claimant could have provided a request to the Carrier for a postponement before June 14, but he failed to do so.

The Carrier was made aware of the scheduled medical appointment on June 14, 1995 when the hearing was scheduled. The only medical documentation in the record is a letter dated July 27, 1995 from a Dr. Aylward to the Organization in which he alludes to a referral of the Claimant for treatment by a Ms. Veronica Neary of the EAP program for Conrail. Dr. Aylward goes on to state that he "continues to see him [the

Claimant] on a weekly basis and he is currently in the process of applying for permanent disability through the Railroad Retirement Board.”

In his letter, Dr. Aylward does not indicate that the Claimant had a medical appointment on June 14, 1995, or was otherwise unable to be present at the June 14 hearing. Although the Carrier was aware that the Claimant had suffered from a mental condition, there is nothing in the record to establish that his mental condition prevented him from attending the hearing on June 14.

Moreover, the record fails to include documentary evidence that the Claimant had a medical appointment on June 14, 1995; nor has any justification been provided by the Claimant for his failure to notify the Carrier before June 14, because of the medical appointment. In light of the record, it is the Board’s judgment that although he was given proper notice to appear at the hearing on June 14, 1995, he voluntarily chose not to attend.

The Organization’s representative contacted the Carrier at approximately 7:50 A.M. to request the postponement. The Carrier declined in light of the postponements during a period of almost one and one-half years of postponements. The Carrier waited until 11:30 A.M. to begin the hearing which was scheduled for 10:00 A.M. Since neither the Claimant nor his representative appeared, the hearing was held in absentia.

Under the circumstances presented, no valid reason was provided by the Organization for a postponement of the hearing. The Board cannot conclude that the Carrier violated Rule 27 (d) by declining the request to postpone the June 14 hearing.

II THE MERITS

The Board finds that the evidence at the hearing warrants the conclusion that the Claimant threatened Botsford by stating that he would kill him if he did not permit him to leave work for a doctor’s appointment. There is no turning back from such a serious and grave threat from an employee to a supervisor.

The threat lingers well beyond the precise time it is uttered. It undermines the supervisory authority necessary to control and direct the working force. The damage

the threat causes to the relationship between employee and supervisor is irreparable. See, e.g. Third Division Award 32050. Accordingly, this Board is persuaded that the penalty of dismissal is not to be disturbed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of July 1999.