

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Harris L. Danner, Referee

PARTIES TO DISPUTE:

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

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of The Brotherhood that:

(1) The Carrier be required to reinstate G. K. Kelly of Odessa, Texas, to his former position of Warehouse Foreman.

(2) Carrier be required to compensate G. K. Kelly for all time lost from October 4, 1937, until Mr. Kelly is reinstated to his former position of Warehouse Foreman."

EMPLOYEES' STATEMENT OF FACTS: "On September 20, 1937, Clerk G. K. Kelly made request of Agent W. P. Frame for leave of absence to attend to personal matters involving finances. Agent Frame made request of Superintendent for leave of absence for Clerk Kelly. Request was declined by Superintendent. As it was very necessary for Mr. Kelly to be absent from his position under date of October 2, 1937, Mr. Kelly wrote Agent Frame and advised him that it would be absolutely necessary that he be off and that he could not report for duty on Monday morning, October 4, 1937. When Clerk Kelly failed to report for duty on the morning of October 4, 1937, Superintendent Pistole ordered him held from service pending an investigation. Investigation was held on October 6, being conducted by Trainmaster K. R. Woodford, following which, Superintendent Pistole, under date of October 10, 1937, removed Clerk Kelly from service, account absenting himself from duty as General Clerk Local Freight Office, Odessa, Texas, without permission, on October 4 and 5, 1937."

CARRIER'S STATEMENT OF FACTS: "On October 4, 1937, Clerk G. K. Kelly, Odessa, absented himself from duty without permission in violation of Rule 306, reading:

'306. Employees must not absent themselves from duty without permission.'

"On September 20, 1937, Kelly made a request on the Agent at Odessa for 90 days leave of absence for the purpose of entering into business for himself. His request was transmitted to Superintendent Pistole and he in turn advised Agent Frame:

'I understand Kelly wishes leave of absence to work elsewhere, or enter into business for himself. As you know, Kelly's services are needed at this time, and we cannot consistently grant his request for leave of absence and permit him to work elsewhere, or go into business for himself.'

"It is not the policy of this company to grant employes leaves of absence to work elsewhere, or to enter business for themselves. The investigation, 'Exhibit A' attached, conclusively shows that Kelly was guilty as charged, and would particularly refer the Board to Page 1, questions and answers of Kelly:

- 'Question: Did you work on that position on Monday, October 4th, or Tuesday, October 5th?
 'Answer: No sir.
 'Question: Did you have permission to be absent from duty on those two days?
 'Answer: No sir.
 'Question: Have you recently made a request for a leave of absence?
 'Answer: Yes sir, the 20th of September.
 'Question: Was that request granted or declined?
 'Answer: Declined.
 'Question: Were you notified by Mr. Frame, the agent, and by me, (Trainmaster Woodford) that your request had been presented to the superintendent and declined by him?
 'Answer: Yes sir.'

"The evidence, including the testimony of Clerk Kelly, shows beyond any question of a doubt that Kelly was guilty as charged and we request that your Board deny the claim for reinstatement as well as pay for time lost and we would refer to the opinion as rendered by your Board in its Award 891 wherein it is stated:

'Our function in this case is not to substitute our judgment for that of the carrier or to determine what we might or might not have done had the matter been ours to handle. We are entitled to set aside the carrier's action only upon a finding that it was so clearly wrong as to constitute an abuse of the discretion vested in the carrier. We have carefully reviewed the evidence and have concluded that we could not within the limitations imposed on us, make such a finding.

'Claim denied.'

"It is affirmed that all data submitted herein in support of our position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

"Management desires opportunity to have representative present at the hearing."

There is in evidence an agreement between the parties bearing effective date of April 1, 1929.

OPINION OF BOARD: The petitioner, G. F. Kelly is a receiving and delivery clerk of the respondent, The Texas and Pacific Railway Company. In September of 1937, he requested a 90 days leave of absence in order to engage in business of his own. The proper officials of the respondent denied the request, being of the opinion that his services were needed at that time, due to the press of business immediately forthcoming from the cotton shipping season. Thereupon, and upon his own initiative and volition, he took the leave of absence anyway, having first reported to his superior that he would not report for duty on a certain named date. Thereafter an investigation was held and he was discharged. Herein he asks that the respondent be required to reinstate him to his former position and to compensate him for all of the time since he so absented himself.

The foregoing is a simplified statement of the facts in substance, without unnecessary details. The solution is equally as simple. In the opinion of the employer the petitioner's services could not reasonably and conveniently be spared at that time for the period of leave requested. Said opinion was not without the support of competent evidence as to facts underlying it

and serving as its basis, according to the record. Possibly another carrier under the same circumstances, or the same carrier with different officials, may have come to a different conclusion. Still, unless we could say that the refusal was arbitrary or capricious we would ourselves, be acting arbitrarily or capriciously if we should order the respondent to comply with the claims of the petitioner.

Rule 24 of The Texas and Pacific Railway Company agreement, with that class of clerks and other office and station employees of which petitioner was a member, provides:

"Other employees may be granted leave of absence not to exceed ninety (90) days, except in case of sickness or disability leave may be extended as may be necessary and practicable."

It is noticed that the above rule does not require that leaves of absence be granted as a matter of right, but, on the contrary, states that such leaves "may" be granted. According to the rule the approval of a request for leave of absence is permissive and discretionary, not mandatory. A sorry situation would indeed exist, and chaotic conditions could easily be expected, if an employee could arbitrarily walk off the job if and when he pleased, regardless of the wishes of his employer. Obviously the employer should have some voice in the matter. If the refusal to grant a leave of absence is not arbitrary or capricious, and is one at which the employer may reasonably arrive in view of all the facts and circumstances of the case, the employee is not justified in taking matters into his own hands, by assuming the leave of absence without the consent of his superiors.

We believe that the foregoing is so correct on its face, that the citation or quotation of authorities is unnecessary. However, precedent is not lacking; the following Awards may be referred to as support for the holding herein: 71 (SG-89), 135 (PC-148), 232 (TE-243), 373 (PC-344), 419 (DC-394).

The record fails to reveal any adequate ground or reason for disturbing the disciplinary action of the respondent or for ordering the respondent to reinstate and compensate petitioner.

The Board finds that G. F. Kelly should be denied the relief sought.

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 employee involved in this dispute are respectively carrier and employee 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 claim of G. K. Kelly for reinstatement to his former position with full seniority rights and compensated for wage loss suffered be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1940.