

Award No. 4316
Docket No. CL-4275

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

Terrell W. Jenkins, Trucker, Kensington Freight Station, Philadelphia, Pennsylvania, Philadelphia Terminal Division, be returned to service with all rights unimpaired and compensated for all monetary loss sustained dating from September 6, 1946 until adjusted. (Docket E-396.)

OPINION OF BOARD: Claimant was dismissed by Carrier after a trial on a charge of "Threatening to strike Foreman Call at Kensington Freight Station, 7:30 A. M. (E. S. T.), September 6, 1946". The charge arose out of the following incident. At the time and place indicated there was an extraordinarily large amount of freight to be handled and the platform was highly congested. Only one aisle was open and the claimant, a trucker, was second in a line of loaded trucks which were blocking the return of empty trucks coming down the platform. In the Foreman's own words this is what followed:

"* * * I asked Jenkins to get back and in the meantime the other truckers had already moved back. When he finally moved back he said he never heard of a loaded truck moving back and was still grumbling. I attempted to move the truck to get it out of the way and did not attempt to push him. I did tell him to get the hell along the platform and he said he would go to the office. I told him if he wanted to go to the office he could go up. This is the time he said he would punch me in the mouth using profanity."

It has been argued on behalf of the Employees that Jenkins was deprived of a fair and impartial trial because of Agent Clark's involvement in a way with the incident which brought about Jenkins' dismissal. While we feel that, in a court of law, a judge would have disqualified himself from presiding at a trial if he were as close to an incident involving a matter before his court as was Clark, and feel further that the conduct of a trial by subordinate local supervisor is not in accord with the highest standards of American jurisprudence, we cannot say that in this instance the employee was not given a fair and impartial trial as contemplated by the agreement. It has been recognized by previous awards of this Division (Award 3288) that the Carrier in conducting these hearings occupies a somewhat conflicting position. Its representative is both an interested party and also a "fair and impartial" judge.

The difficulty of the position in which the Carrier is placed requires meticulous care in their conduct in order that both functions may be properly performed. At the trial, Jenkins had representation, was given full opportunity for cross-examination of adverse witnesses and for presentation of such evidence as he desired. There was substantial evidence upon which to find him guilty as charged and although there was conflict as to some of the surrounding circumstances, Jenkins himself admitted the threat. So much for the conduct of the trial and finding of guilt.

With respect to the discipline assessed, we believe that it was arbitrarily or capriciously imposed. We think that the penalty of dismissal from service was out of proportion to the gravity of the offense. At the outset, we assert with all the emphasis at our command that we do not by any means consider a threat to strike a supervisor a light offense under all conditions and we can envision many situations in which the penalty of dismissal might be fully justified if such a threat were made.

In our recital of the facts, we have purposely used the Foreman's own words in describing the incident for we believe that in itself it shows that there were extenuating circumstances surrounding the threat. Jenkins had previously testified on investigation that Call had pushed him and that is probably the reason for the statement "I attempted to move the truck to get it out of the way and did not attempt to push him". Yet, later on in his testimony, Call stated:

"* * * I merely attempted to push the handle of the truck, and if I did touch his body it happened when I was putting my hands on the truck and if I had touched him it would have been on his hands and not on his shoulder. If I did touch him I was not conscious of it."

There is no doubt in our minds that there was body contact between Jenkins and Call. That there was profane and violent language between them is also apparent and understandable. These men are engaged in hard physical labor, not in a pink-tea party, and they neither have nor could be expected to have the suave, polished manners of the drawing room and could not be expected to observe such courtesies in the conduct of their work. Now, as appears from the record, the only way Call would have reached Jenkins was to have come up from behind him, and in order to get hold of Jenkins' truck, particularly in view of the congested conditions at the platform, some physical contact had to take place. Under these circumstances, Jenkins might well have thought that Call intended some physical violence upon him, and in an effort to forestall the same, threatened to punch him (Call) in the mouth. Such a threat under these circumstances is hardly as grievous an offense as if made coolly and deliberately because of dissatisfaction with a politely-given order. It is also to be noted that there was no overt act shown indicating an intent to carry out the threat. In other words, the threat was another part of the name-calling which ensued. To dismiss a man for this offense under the circumstances was certainly an arbitrarily-assessed punishment.

We do not condone threatening to strike supervisors in any way and Jenkins did deserve some punishment. For that reason, we direct that he be reinstated with seniority rights unimpaired, but with no monetary compensation for wages lost.

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's assessment of discipline was arbitrary and capriciously imposed.

AWARD

Claimant reinstated with seniority rights unimpaired and without compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 16th day of February, 1949.