

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20826
Docket Number CL-20855

Louis Norris, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7594) that:

A. Carrier unjustly assessed service record of Mr. E. F. Kelly, Yard Clerk, Port Huron, Michigan, with thirty (30) demerit marks, as result of investigation held on June 13, 1973, in which the transcript failed to support the decision of the Carrier in sustaining the charges made against Mr. Kelly in the caption of the investigation.

B. Carrier should now pay Mr. Kelly eight (8) hours at straight time rate of his position for May 16, 1973 and each subsequent day Mr. Kelly is out of service.

OPINION OF BOARD: Claimant has seniority date of September 13, 1949. Some time prior to May 16, 1973, Carrier moved under the provisions of the Agreement between the parties to transfer Claimant from Seniority District No. 175 - Baggagehandler, to Seniority District No. 192 - Yard Office. Accordingly, Claimant was instructed to report for IBM machine training from Data Inspector Kadlechick, before being placed in the latter job position. On May 16, 1973, while engaged in such training, conversation developed between Claimant and Kadlechick, during which Claimant requested the latter's name and address. Kadlechick is alleged to have responded, after writing out his name and address, "give this to your f----- lawyer and both of you wipe your asses with it". Claimant became highly offended and, although Kadlechick immediately apologized and continued to say he was sorry, Claimant left the property, reported to his physician for treatment for "extreme anxiety", and has remained off the job ever since.

These facts, although summarized for brevity, are undisputed on the record or have been quoted exactly from the testimony of Claimant (rp 73). Although the testimony varies as to the exact words used by Kadlechick, we quote Claimant's version precisely. For, the resolution of this dispute hinges upon whether such language, at its worst, proximately caused Claimant to suffer the mental and physical condition of which he complained and justified his remaining off the job for a period of over two years.

The record further indicates that on June 13, 1973 formal investigation was held in connection with Claimant's deserting his assignment and being absent without leave since 8:15 a.m. on May 16, 1973. Carrier found the charge to have been sustained and imposed a penalty of 30 demerit marks against Claimant's record.

Further developments occurred after said penalty was assessed, including:

- a) Claimant's bidding for, and being awarded, the job of Yard Checker on July 18, 1973, on which "he booked off sick" (rp 41);
- b) Scheduling of a further investigation for being absent without authority, which was adjourned to August 23, 1973 and then postponed without date - due to Claimant's contention that "he was too ill to attend"; and finally
- c) Carrier's letter of April 2, 1974 to Claimant reminding him that he was still considered "absent without authority".

Claimant has steadfastly maintained that the abusive language quoted above caused him to require medical treatment and justified his continued absence from work ever since May 16, 1973. Petitioner now asserts that the penalty imposed was unjust and demands back pay since May 16, 1973.

Initially, Carrier contends that the portion of this claim, designated Paragraph "B" and relating to the demand for back pay, is actually a claim against a co-employee and is not properly before this Board under the pertinent provisions of the Railway Labor Act. In fact, however, the entire claim is directed against Carrier and relates to conduct which occurred during the course of Claimant's employment. In these circumstances, this claim can properly be categorized as a "dispute" under the Railway Labor Act and, as such, is properly before this Board for determination on its merits.

Such determination rests on one simple issue: was the abusive language above quoted, at its worst, the sole proximate cause of Claimant's mental and physical condition justifying his continuous absence without authority ever since May 16, 1973. We think not; nor does the record evidence support Claimants' contention.

We deplore the use of offensive language by any employee, particularly one in a supervisory position. However, we cannot conclude that the single utterance by Inspector Kadlechick, which was more in the nature of a sarcastic rejoinder rather than personal abuse, followed as it was by repeated apologies, had such a tremendous impact upon Claimant as to cause a condition of severe nervous anxiety sufficient to warrant his remaining out of service for so extended a period of time. We venture to say that in the present context of language usage on the stage, screen and other similar public arenas, Claimant has heard much worse. In any event, Claimant's nervous anxiety cannot be attributed reasonably and rationally to this single use of offensive language. As the record indicates, the cause lies elsewhere.

In the latter connection, the statement of Dr. Balboa, dated June 23, 1973, is particularly apropos. It reads as follows (rp 86):

"To Whom It May Concern

Re: Mr. Emerson Kelley
1410 11th St.
Port Huron, Michigan

Patient was first seen in the office on March 29, 1973 because of 'severe nervous tension', which he says started when his old job was abolished and he was moved to a different job. He claims he has since been very despondent and couldn't sleep, eat or function.

His physical findings were normal. He is presently on Serax 15mg. q 6 hours.

Respectfully yours,

RONALDO S. BALBOA, M.D."

It appears, therefore, that Claimant's condition of "severe nervous tension" antedated the incident of May 16, 1973. In fact, "his old job was abolished" on or about May 1, 1971, and this appears to be the basic reason for his severe nervous tension (rp 31, 86). Dr. Balboa's later statement of August 20, 1973 reveals an aggravation of Claimant's condition, as follows (rp 34):

"This is to certify that Emerson Kelley is under my care for extreme anxiety. At present, any aggravation of his condition may result in a nervous breakdown. If this should happen, I would refer him to a psychiatrist."

It becomes increasingly apparent that the underlying cause of Claimant's mental condition, as described in the above medical statements, is far removed from the incident of May 16, 1973. Furthermore, that the expression used by Inspector Kadlechick, under the circumstances then prevailing, could not possibly have caused so severe an impact upon Claimant, much less justified his remaining off the job for over two years.

Claimant's contention, therefore, that his illness and absence from service are attributable to the alleged misconduct of Inspector Kadlechick, is not supported by the evidence. Rather are we inclined to the conclusion that his remaining off the job was his own choice and that his reference to the latter incident was a mere pretext to justify his subsequent conduct. In fact, ample opportunity was afforded Claimant by Carrier to return to service. Claimant chose not to return. In view of these findings, we cannot conclude that the penalty assessed against Claimant was severe or unreasonable.

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

That the parties waived oral hearing;

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1975.