

PUBLIC LAW BOARD NO. 2960

AWARD NO. 41

CASE NO. 87

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of F. M. Dillion for allegedly being argumentative and threatening towards his supervisor was without just and sufficient cause and excessive punishment (Organization File 9D-3041; Carrier File D-11-17-407).
- (2) Claimant F. M. Dillion shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and the Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

The Claimant was directed by the Carrier to attend an investigation to be held May 4, 1982, on the following charge:

"Your responsibility, if any, in connection with your being argumentative and threatening while working on the Rail Gang on April 15, 1982."

The investigation was held as scheduled and subsequent thereto, the Claimant was dismissed.

The investigation was called in connection with the Claimant's reaction to his Roadmaster's action of removing him from the operation of the 'Anchor Machine' on the day in question.

The Carrier relies on the testimony of Roadmaster Shanks and Project Engineer Klein. They also make reference to an admission by the Claimant that he argued with the officials involved.

Roadmaster Shanks testified that after he informed the Claimant about the change in his machine assignment, the Claimant started yelling and swearing repeatedly. Shanks stated he felt threatened and ordered the Claimant off the property, and as the Claimant left, he said, "I'll ... get you guys for this." Project Engineer Klein testified that he approached the Claimant and Shanks during their conversation, and the Claimant also yelled and cursed and continued to argue with him about whether he could or should be taken off the machine. Further, Klein testified that the Claimant, after being instructed to leave the property, said he wasn't going to leave. Klein then called a special agent to escort the Claimant off the property. The Claimant then argued more and when he left (unassisted) he said, "I will get you just like I got Jim Jewell..." Klein also said he felt threatened.

The Organization argues that the record does not establish that the Claimant was argumentative or threatening. They point out that the Claimant did acknowledge that the Claimant used profanity but that, according to the Claimant--it corresponded to language used by the Roadmaster. It is noted that the Claimant admitted he wasn't "completely calm", but because he was out of work all winter, he wanted to know why he was being taken off the machine and being sent home. The Organization

further contends that even if the Claimant was somewhat responsible for the incident, there is ample precedent for his reinstatement. They direct attention to a variety of awards including Third Division Awards 18,439, 21,390, 19,925, 21,829, and 21,810 and Second Division Awards 8308, 8318, 8460, 8925, and 8935.

In its review of the record, the Board notes several references in the contentions regarding the Claimant's alleged use of profane language and alleged refusal to comply with instruction to leave the property.

However, the precise charge related to "being argumentative and threatening..." Therefore, it would be improper to consider charges relating to other actions such as profane language and insubordination.

In regards to the issue of being threatening, it is noted that the evidence sharply conflicts. Shanks and Klein both indicated they felt threatened by the Claimant. Shanks did indicate that as the Claimant left the property, he said something to the effect, "I'll ... get you guys for this." Klein indicated the Claimant said, "I will get you just like I got Jim Jewell ..."

The Claimant denied he threatened Shanks or Klein. He stated, "I do not feel that I threatened them in no type of way. I gave them no idea I was going to hit, grab, or do anything to them." He also denied saying anything about Jim Jewell, because he doesn't know a Jim Jewell or had any dealing with him.

It is the opinion of the Board that there is substantial evidence to support the charge that the Claimant was argumentative and said to Klein and Shanks, "I'll get you guys for this." However, when the whole


of the circumstances are considered, the Board believes that this charge, standing alone, does not warrant dismissal.

The Board was not convinced that the entire incident was as serious as the Carrier witnesses believed it was. They felt threatened but had no evidence to offer that would suggest the Claimant intended to physically harm them. There was no testimony regarding a raised hand or a clenched fist, etc. It is clear that the Claimant was argumentative, and the comment as he left is viewed as part of that argumentative demeanor rather than a serious threat to the supervisor's well being. Again, if there were evidence of something more serious than being argumentative, the Board would have concluded differently.

The Carrier argues the dismissal is justified in part by the Claimant's past record. Indeed, this Board has considered a poor past record as a basis for discharge when considered in conjunction with even minor defenses especially where there is evidence of progressive discipline. Generally speaking, the Claimant's past record is not good and included a previous dismissal and several suspensions. However, the past record in this case does not indicate for what offense the dismissal or one of his suspensions were issued. With an incomplete past record before the Board, it cannot give adequate consideration to the question of how the past record relates to the instant offense.

There is no question that the Claimant engaged in misconduct and is deserving of significant discipline. However, in view of the problems relating to the past record and the limited seriousness of the incident, the Board will direct the Carrier to offer reinstatement without back pay to the Claimant. The Claimant should consider this his last chance to become an acceptable Employee.

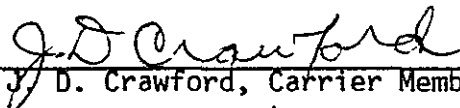
AWARD: The Award is sustained to the extent indicated in the Opinion.  
The Carrier is directed to reinstate the Claimant, without back pay, within 30 days of the date of this Award.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated: Dec 23, 1983.