

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 32

Case No. 32

System Docket No. BMW-D-227

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant James Mervin was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Mervin shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule 15 of the Scheduled Agreement.

FINDINGS

The Claimant was subject to an investigative hearing under the following charges:

It is alleged that on January 26, 1994 at approximately 9:00 p.m. you deliberately and willfully originated threats implying physical violence directed to Assistant Division Engineer E. Mistovich which were intended to harass and intimidate him for your own personal reasons.

It is further alleged that you exhibited discourteous and unprofessional behavior when you instructed the radio room operator to write your dictated threat on paper and deliver it to Mr. Mistovich.

Following the hearing, the Claimant was dismissed from service.

Prior to the date of the incident, the Claimant had been granted three days' bereavement leave and two days' vacation (for January 27-28). On January 26, he called the Radio Room and spoke to the Radio Room Foreman, asking for the home telephone number of the Assistant Division Engineer. The Foreman declined to provide the number but did "patch" the Claimant's call to the Assistant Division Engineer's number. According to the Assistant Division Engineer, the Claimant requested vacation time, but the conversation ended when the Claimant reportedly made a snide remark.

Shortly thereafter, the Claimant called the Radio Room Foreman again, this time, according to the Foreman, asking for the Assistant Division Engineer's address. When this request was refused, the Claimant asked the Foreman to leave a note for the Assistant Division Engineer and, according to the Foreman, dictated the following:

If you have the heart, the guts and the balls,
you'll call me at 445-4184 tomorrow or I'll whoop your
ass, and don't think I won't do it.

The Foreman attempted to dissuade the Claimant from his request to leave this note, which would obviously get the Claimant in trouble. After this call, the Foreman telephoned an

Organization representative in an attempt to get help to defuse the situation. While that call was in progress, the Claimant called again, refused an offer to talk to the representative, and insisted that the message be left for the Assistant Division Engineer. In doing so, the Foreman testified that the Claimant had "threatened" him. As a result, the note as quoted above was left for the Assistant Division Engineer. Based on the contents of the note and his knowledge that the Claimant had asked for his home address, the Assistant Division Engineer testified he felt threatened and believed the Claimant presented a genuine danger to himself and his family.

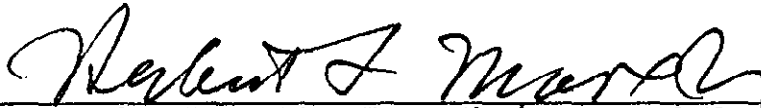
At the hearing, the Foreman testified that he had considered the Claimant to have been "extremely distraught and extremely intoxicated" during the telephone calls. Nevertheless, the Claimant at the trial denied that he was intoxicated at the time. Further, he denied dictating the latter part of the note ("I'll whoop your ass, and don't think I won't do it"). On this point, the Board has no hesitancy to accept the Foreman's testimony and evidence as to the note's contents, inclusive of the threatening portion.

The Organization contends "mitigating circumstances" (being intoxicated) should explain the Claimant's conduct. The record shows that the Claimant did undertake remedial medical treatment immediately after receiving notice of his dismissal. This treatment continued until and beyond the investigative hearing. The difficulty, however, is that the Claimant, even four months

after the event, continued to deny that he made the threat in the note he insisted be left for the Assistant Division Engineer. For this reason, there is good cause for the Carrier to continue to be concerned with the Claimant's demeanor. The Carrier correctly argues that the threatening of physical harm to a supervisor is a most serious offense, for which dismissal from service is an appropriate disciplinary response. The Claimant apparently is not willing to recognize the gravity of his offense. The Board is without sufficient assurance as to the Claimant's demeanor to overrule or modify the Carrier's judgment in this instance.

A W A R D

Claim denied.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 6-28-95