



Award Number 17741

Docket Number MW-17906

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

- Robert C. McCandless, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
NORTHERN PACIFIC RAILWAY COMPANY**

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

- (1) *The dismissal of Machine Operator H. A. Cuddy on January 12, 1968 was without just and sufficient cause and based upon unproven charges.*
- (2) *Machine Operator H. A. Cuddy now be returned to service with all previous seniority unimpaired and he be compensated for the wage loss suffered by him (Rule 52(g)) because of the violation referred to in Part (1) of this claim.*

OPINION OF BOARD: Having originally been charged with violations of General Rules A and G and Rules 700, 701, 701(B), 702, and 702(B), Claimant was finally dismissed after an investigation which found him guilty of "quarrelsome and insubordinate behavior" and having been "observed under the influence of intoxicants," those being the specific violations of Rules G and 700 cited by Carrier.

The only issue before the Board is that of a claim for back pay since the Claimant was subsequently restored to work.

It would be considerably easier for this Board to leave the findings of the investigation undisturbed since the record shows conflicting testimony as to the facts, and especially since Claimant has been restored to work. But this Board cannot shrink from the fact that a thorough review of this record shows that the Carrier has failed to establish by a clear preponderance of substantial and competent evidence of probative value that the Claimant was "under the influence of intoxicants, insubordinate, quarrelsome" . . . all or any one of them.

First, the investigation found Claimant to have been "observed under the influence of intoxicants." Claimant's superior and one other claimed they could smell alcohol. Still another said that although he could not smell it, he observed a fan being turned on to dispell the smell of alcohol. Yet, Claimant denied having been in such a state. The Agent, of whom he requested permission to voluntarily have the Carrier's doctor check him for intoxication, stated he could not smell alcohol. The Carrier's doctor, who was not called at the investigation, saw Claimant within an hour of this alleged "observation" and certified: "Mr. H. A. Cuddy (Claimant) was in my office on January 12, 1968 and that morning he was not intoxicated." Surely, as to being "under the

influence of intoxicants" the Carrier has failed in its burden of proof by a preponderance of the evidence.

Secondly, the Claimant was found to have been "insubordinate and quarrelsome." The Agreement is properly silent to the point that an employee may not confront his accuser(s) for harrassment, real or imagined. Further, nowhere does the record indicate that Claimant refused any order to work. Surely words had been spoken between the Claimant and his supervisor, but the record does not support any contention that Claimant did or said anything of the magnitude to clearly prove a violation of the Agreement.

Having failed its burden of proof, Carrier is directed to make the back payment requested within this claim.

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1970.