

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

Award Number 24311
Docket Number MW-24244

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way **Employees**
{ Denver and Rio **Grande** Western Railroad Company

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

(1) The dismissal of Extra Gang Laborer R. J. **Valdez** for 'alleged insubordination, intemperance, and carelessness of the safety of himself and others' on July 8, 1980 was arbitrary, capricious, without just and sufficient cause and on the basis of **unproven** charges (System File **D-18-80/MW-27-80**).

(2) Extra Gang Laborer R. J. **Valdez** shall now be allowed the benefits prescribed in Agreement **Rule 28(d)**."

OPINION OF BOARD: Claimant, Mr. R. J. **Valdez**, entered service of the Carrier on May 7, 1979* and at the time of the alleged incident was working as an extra gang laborer. On July 14, 1980 Claimant received a notice to attend a formal investigation on July 17, 1980 to:

"develop facts and place responsibility, if any, in connection with . . . (his) . . . alleged **insubordination**, intemperance, and carelessness of the safety of himself and others near Mile Post 278 near Tennessee Pass, Colorado . . . (on) . . . July 8, 1980."

As a result of this investigation Claimant received notice dated July 25, 1980 that he had been found guilty as charged and that he was dismissed from service of the Carrier.

An **analysis** of the transcript of the hearing **shows, that** according to the testimony of the Extra Gang **Foreman, Claimant** walked away from the **adzing** machine he was operating when he was criticized by this Foreman for cutting ties too deeply **and** for being slow when **operating** the machine. There is inconsistent **testimony** from the hearing transcript concerning the sequence of events which followed after this. According to supervisory witnesses **Claimant** then took off his shin guards and threw them **in** an intemperate and **careless** manner, **removed** his glasses and hard hat, and used gestures and language which **were** threatening to the Extra Gang Foreman. Co-workers who appeared as witnesses on the other hand, stated that Claimant **only** uttered (what according to all can only be construed as inappropriate) strong verbal countermands to the Foreman

*Prior to this Claimant had **worked** for the Carrier for several months in 1976 (Carrier's Exhibit I).

when the Foreman pushed him after the Claimant had taken off his shin guards and "pitched them" on the ground in a manner which purportedly is not **uncommon** with this **type** of safety equipment.

This Board has gone on record **on** many occasions to the effect that it is not constituted to make determinations related to conflicting evidence (See Third Division Awards 23085 and 22145, inter alia). In this respect, this Board quotes Award 22721, which states: "issues of **credibility** must be determined by those **who** received the evidence and testimony, and (this Board) (has) . . . no basis for substituting (its) **judgment** in that regard".

Upon review of the **record**, **therefore**, this Board finds no factual basis for reversing the **determination** of the Carrier **in** this matter.

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 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April 1983.

