

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 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: Acting Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

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

