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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36123
Docket No. MW-36079
02-3-00-3-260

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Laborer R. A. Flores for an alleged altercation with a fellow employe on December 17, 1998, at Salinas, California, was without just and sufficient cause, based on an unproven charge and excessive punishment (Carrier’s File 1183683).
- (2) Laborer R. A. Flores shall now be reinstated to service with seniority and all other rights unimpaired, compensated for net wage loss suffered by him and have his record cleared of the incident.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

In this instant case, an incident occurred on December 17, 1998 between Claimant Flores and Trackman R. Cruz. As both were alleged to be involved in an altercation, they were ordered for an Investigation. The Claimant was removed from service on December 18 and his Investigation held on December 28, 1998. Subsequently, by letter of January 14, 1999, the Claimant was found guilty and assessed a Level 5 permanent dismissal.

The Organization argues that Trackman Cruz was issued a Level 1 discipline and returned to work, while the Claimant was not properly disciplined for the same altercation. It further points out that any difference in treatment must consider the fact that the Carrier's Foreman and Assistant Foreman were aware of the clowning and joking that had occurred and took no action. When it finally escalated, the evidence against the Claimant is primarily from Trackman Cruz, which was self serving and lacked credibility. In fact, it is the Organization's position that there is no proof of a "punch" and that the actions of the Carrier were improper.

The Board disagrees. The testimony clearly indicates that during the altercation, the Claimant did engage in some behavior involving physical contact he made against Trackman Cruz. There is clear testimony from the Manager of Track Maintenance who investigated the incident that a physical altercation occurred with the Claimant responsible. He testified that Rafael Cortez said he had seen "Cruz's body going backwards." Truck Driver Cortez testified that he witnessed "body contact" and that the perpetrator was the Claimant. Even if we discount Trackman Cruz's testimony that he was "hit . . . in the stomach," there is sufficient probative evidence to find the Claimant guilty of a physical altercation.

The Organization's arguments that the two were involved and received different penalties is accurate, but does not reflect differential treatment for the same actions as the Organization suggests. Trackman Cruz engaged in the altercation and received a Level 1 Letter of Reprimand for "discourteous remark concerning fellow worker." The record before us suggests no other conclusion. The Claimant was disciplined with annotation that "Employee was responsible for altercation with fellow employee causing bodily harm." Our review of the evidence confirms this conclusion. The Board does not find the Carrier's arguments incorrect. As for the discipline assessed, the Board finds that the assessment of dismissal is excessive under these instant circumstances. The Claimant should be returned to service with seniority and all other rights unimpaired, but without compensation for time lost or his record cleared of the incident.

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AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of July 2002.