

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37273  
Docket No. MW-37966  
04-3-03-3-372

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Florida East Coast Railway Company, L.L.C.)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service and subsequent dismissal) imposed upon Mr. P. W. Clarke in connection with charges of conduct unbecoming for alleged verbal threat to Track Supervisor W. R. Fletcher on August 4, 2002 and alleged sleeping while on duty during a rules briefing on August 4, 2002 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, all references to this discipline shall be stricken from Mr. P. W. Clarke's record and he shall be reinstated to service with all rights and benefits restored and compensated for all lost wages.”

**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.

The Claimant, a Track Foreman with about four years' seniority, was at a Rules meeting on August 4, 2002, when Track Supervisor W. R. Fletcher observed him covering his eyes and face with his hands. At the end of the meeting, when Fletcher asked the Claimant approximately three times if he was all right, the Claimant made no reply. After Fletcher commented that under such circumstances the Carrier could require an employee to take a drug/alcohol test, he instructed the Claimant to get certain tools and report to the work site. The Claimant then stated to Fletcher: "You know something, I was going to knock you out for the statement that you made." Shortly thereafter, Fletcher telephoned the Claimant on his cell phone, advising him that he was being withheld from service pending a formal Investigation.

By letter dated August 7, the Carrier notified the Claimant of an Investigation on August 20, 2002 to determine the facts relating to his alleged responsibility in connection with conduct unbecoming an employee by reason of his having made a verbal threat to Fletcher and sleeping on duty during the Rules meeting. The August 7 letter also notified the Claimant that he was being withheld from service pending the Investigation. Following the Hearing, the Carrier sent the Claimant a letter dated September 5, 2002 advising him that, although substantial evidence had been produced that he was guilty of verbally threatening Fletcher, he was to be returned to active service, without pay for time lost and with 30 demerits assessed. With respect to the sleeping on duty charge, he was found guilty, as charged, and was dismissed, effective immediately, because he had admitted at the Hearing that he had covered his face and eyes with his hands and had not responded to Fletcher's questions.

After the Organization appealed the Carrier's decision, the Carrier denied the appeal.

Contrary to its obligation under the Board's Uniform Rules of Procedure, the Carrier failed to include with its Submission to the Board the transcript of the investigative Hearing held on August 20, 2002. Because the Carrier bears the burden of proof in this disciplinary matter, its failure to include the transcript is

fatal to its case. Accordingly, the Board is compelled to sustain the claim. See, e.g., Third Division Awards 35499 and 35606.

The Carrier will be required to pay the Claimant backpay covering the period from September 5, the date of his dismissal, to December 8, 2002, and to expunge from his personnel record all reference to the discipline/dismissal resulting from the incidents on August 4, 2002. In a companion case involving separate issues (Third Division Award 37274) the Board upheld the Claimant's dismissal effective December 9, 2002.

**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 5th day of November 2004.