

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26049

Docket No. 45982

04-1-03-1-B-2193

The First Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Belt Railway Company of Chicago

STATEMENT OF CLAIM:

"It is the claim of the petitioning Organization that Switchman J. Mankowski be reinstated to service, paid for all time lost, being held out of service from February 5, 2002, including time for attending an investigation at 9:00 a.m. on February 22, 2002, and to have any mention of the matter removed from his personal record due to the Carrier's unjustified assessment of 60 days suspension held in suspense for 9 months, for violation of a non-contractual, arbitrarily imposed, so called 'Full Time Employment Policy,' not for a violation of the Book of Rules, Safety Rules or Timetable of Switchman Mankowske, Claim #E-18-02."

FINDINGS:

The First 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 a letter dated February 5, 2002, the Claimant was notified to attend a formal Investigation in connection with a charge of excessive absenteeism during the period November 15, 2001 to January 15, 2002. After the Investigation took place on February 15, 2002, the Claimant was assessed a deferred suspension of 60 days, to be held in suspension for nine months, or until November 28, 2002.

Although the Carrier contends that the Claimant was assessed a fair and impartial Investigation and that all due process rights were afforded to him, we agree with the Organization that the process was flawed and that a sustaining award must be issued.

The charging officer in this case was the principal witness to testify on behalf of the Carrier at the investigative Hearing. He then proceeded to issue the notice of discipline. In essence, he not only functioned as the prosecutor and chief witness, but he then assessed the probative value of his own testimony in assessing the culpability of the Claimant. In Public Law Board No. 5715, Case No. 1, the Board was faced with a similar set of facts. Concluding that the multiplicity of roles violated basic due process, the Board stated:

"There is in the railroad industry a presumption that investigations held under the discipline provisions of the various agreements will be 'fair and impartial.' It has been held that fairness and impartiality are absent when a single individual, who, in the first instance, has the authority to determine whether the individual should or should not be charged, proceeds to charge, appears and testifies as to facts at issue, responds to questions surrounding the incident, and, finally, makes the decision as to guilt or innocence. He can not indict, testify and decide."

We find that the process was tainted and that the Claimant was adversely affected by the due process violation. Accordingly, the discipline must be reversed without considering the merits of the case.

AWARD

Claim sustained.

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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 First Division

Dated at Chicago, Illinois, this 23rd day of July 2004.