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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 26051

Docket No. 45984

04-1-03-1-B-2195

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:

“Claim of Switchman J. Mankowske that he be reinstated to service, paid for all time lost, including time for being held out of service pending investigation from February 5, 2002, and to have any mention of the matter removed from his personal record due to the Carrier’s unjustified dismissal of Switchman Mankowske.”

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.

The Claimant was dismissed from service following Investigation for falsifying information concerning a personal injury sustained on the job on February 1, 2002.

During the Investigation, Assistant Superintendent of Administration M. Shore testified that he received a telephone call from the Claimant on February 5, 2002 in which the Claimant indicated that he had seen his personal physician the previous day in connection with the on-duty injury. The Claimant told Shore that the doctor restricted him from working as a Switchman but stated that he could work in a training capacity or in the yard office. Shore told the Claimant that he would need a report from the Claimant's doctor explaining the restrictions before the Claimant would be allowed to return to work in any capacity. Shore testified that he was "a bit concerned" about the matter because the Claimant had been examined by the company doctor on the day of the on-duty injury and he had been released to work at that time with no restrictions.

Director of Risk Management and Planning, R. Gelder, testified that he, too, was informed by the Claimant that his personal physician told him that he could not perform his regular switchman duties. Gelder then contacted the office of the Claimant's physician and was told that the Claimant had seen the doctor on February 4, but no work restrictions had been imposed. Gelder further testified that he asked if the records could be sent to the Carrier and he was told that would not be possible because the Claimant had not indicated that this was an on-duty injury and therefore the records were protected from release by privacy laws. The physician's office did agree to provide Gelder with a statement indicating that the Claimant was not under any work restrictions.

The Claimant testified that he was not entirely clear about the matter when he left the doctor's office, but he believed that he was restricted from duty because he was under his doctor's care. He further denied telling his physician that the injury was not work related. The Claimant stated that he had been taking medication that could cause dizziness or drowsiness and that he wasn't thinking clearly. According to his testimony, he told Shore he "wasn't sure" whether he was restricted in his duties. The Claimant also denied telling Gelder that his doctor had restricted him from working as a Switchman. He insisted that at no point had he been dishonest and he denied the charges lodged against him.

In its appeal of the dismissal action, the Organization argued, among other things, that the Claimant was not afforded a fair and impartial Investigation because of the multiplicity of roles assumed by Assistant Superintendent of Administration, M. Shore. The Organization submits that Shore, in addition to presenting testimony at the Hearing, also reviewed the record and assessed the

discipline. In the Organization's view, this constituted a biased review of the record and a predetermination of guilt.

In examining this issue, the Board reviewed the cases discussing the tipping point at which the multiplicity of roles in a discipline case becomes prejudicial to the interests of the employee and precludes a fair and impartial Investigation. The cases cited by the Carrier acknowledge that the most serious role conflict occurs when a Carrier officer gives testimony at the investigation while acting as the hearing officer or the deciding official. However, a distinction has been drawn between a Carrier official who acts as a key or principal witness and one who provides testimony that is not central to the Carrier's case. Thus, for example, the Board in Third Division Award 20285 concluded that a conducting officer who merely indicated on the record the date when he was apprised of the incident under investigation did not deprive the employee of a fair hearing. Similarly, when a charging officer who also acted as the deciding official clarified a question raised by an employee's representative during a hearing, the Board in Fourth Division Award 3068 held that there was no denial of due process.

The instant case stands on a different footing. Shore was one of the Carrier's chief witnesses. His testimony did not merely corroborate that of another witness nor was it peripheral to the crux of the matter at hand. Moreover, Shore's testimony conflicted in part with the account presented by the Claimant, so a credibility determination had to be made in order to render a finding as to whether the charges were proven by substantial evidence. Shore assessed his own testimony in rendering the decision. Although he subsequently recused himself as the appeal officer, the fatal error was in assessing the discipline in the first instance.

Under the circumstances presented, we find that the Claimant was denied the right to a fair and impartial Hearing. Shore's multiple roles sufficiently tainted the process, in the Board's view, so as to require that the discipline be overturned.

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) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

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