

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26052
Docket No. 45985
04-1-03-1-B-2196

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 Engineer M. Graves, Employee #7495, dated March 20, 2002, Claim No. E-1-02, for Mr. Graves record to be expunged and that he be paid for all time lost for attending the investigation on January 17, 2002 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 Operating Rules, Safety Rules or Timetable."

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.

After formal Investigation on January 17, 2002, the Claimant was assessed a deferred suspension of 60 days for violation of the Carrier's absenteeism policy

based on the determination that he was excessively absent during the period September 16, 2001 through November 15, 2001.

The Organization raised several defenses to the discipline, each of which, according to the Organization, was fatal to the Carrier's case. First, it argued that the discipline was untimely. Article 29 (A), the provision relied upon by the Organization, states that "the hearing shall be held within seven days from the date of occurrence or seven days after knowledge of the occurrence is received by the Company." The Claimant was charged in a letter dated December 3, 2001 to appear on a charge that allegedly occurred between September 16, 2001 and November 15, 2001. In the Organization's view, this timeline plainly establishes that the Carrier did not comply with the time limits of the Agreement.

In response, the Carrier argued during the handling of the case on the property that its first knowledge of the Claimant's compensated service for the defined period was on December 3, 2001, and since the Claimant was charged that same day, the untimeliness objection was without merit.

We have carefully reviewed the record of the Investigation. It is clear that there is no reference in the transcript to the date upon which the Carrier had first knowledge of the Claimant's alleged attendance violation. Assistant Superintendent Shore was the principal Carrier witness and he did not address that issue in his testimony. Argument is not evidence, it must be remembered, and mere assertions cannot substitute for probative testimony. Because the Carrier's defense to the Organization's timeliness argument is not supported by any evidence, it cannot be credited.

The other procedural defect proven by the Organization is equally serious. The issue of multiple roles by one officer in discipline proceedings has been raised in numerous proceedings in varying contexts. Generally, the Board engages in a case by case review to determine if an employee's right to a fair and impartial Hearing has been compromised or prejudiced by the multiple roles played by the Carrier officer. While we recognize that on small properties such as this it is sometimes unavoidable for a Carrier officer to take on multiple roles in the discipline process, we draw the line here, where the principal witness in the Investigation on behalf of the Carrier also acts as the official who evaluates the record, determines guilt and assesses discipline. The mere fact that the Carrier officer excused himself from the appeal process does not obviate the problem.

The Carrier has cited cases which have held that certain procedural errors are not sufficiently prejudicial so as to outweigh a finding of guilt based on an employee's own admission of wrongdoing. We would agree that inadvertent or minor errors which cannot be shown by probative evidence to impair an employee's rights would not warrant overturning the Carrier's determination of guilt in such a circumstance.

In this case, however, the procedural and due process infirmities shown on this record cannot be construed as de minimis. On the contrary, the irregularities were significant, thereby tainting the process agreed to by the parties. The fact of the Claimant's admission does not change the result. In the Board's view, the merits of the dispute, including any admissions and defenses to the discipline, cannot be considered where violations of threshold procedural and due process requirements have occurred.

AWARD

Claim sustained.

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.