

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

PARTIES TO DISPUTE: (Transportation Communications International Union  
(Davenport, Rock Island and North Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10379) that:

1. Carrier acted in an arbitrary, capricious, and unjust manner when it suspended Clerk James P. Linehan from the service of the Carrier for a period of seven (7) days from June 11, 1988, through and including June 17, 1988, with the addition of a second penalty deferred suspension of sixty (60) days for a period of one year beginning June 18, 1988, and ending June 18, 1989, as a result of formal investigation held June 6, 1988.

2. Account violation of Rules 56, 59, and 60 of the Clerks' Working Agreement, Carrier shall now compensate Clerk Linehan at the pro rata rate of his position, beginning June 11, 1988, and for each and every day the Claimant is withheld from service, including any and all overtime service that the Claimant would have performed between June 11, 1988 and June 17, 1988.

3. Withdraw the second penalty of sixty (60) days deferred suspension for the period June 18, 1988 through June 18, 1989. This appeal to automatically cover any requirement by the Carrier that the Claimant serve any of this deferred suspension.

4. Compensate the Claimant for any and all loss of health and welfare benefits which would lapse or be denied as a result of this discipline.

5. Expunge from the Claimant's record any and all references to the June 6, 1988 investigation, and the June 8, 1988 decision of suspension, the events and circumstances leading up to this chain of events."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant was assessed a 7 day actual suspension and a 60 day deferred suspension for marking up loads as empties, which resulted in excessive cost to return the cars to the consignee. In addition to appealing this discipline on its merits, the Organization asserts that Claimant was denied due process because the officer who initially issued the charge against Claimant (the Assistant General Manager) was also a witness against him at the Hearing and then issued the discipline. Furthermore, the officer who conducted the Hearing (the General Manager) was the only officer to whom the Organization's appeal was filed.


This Board has sanctioned a multiplicity of roles in some cases while it has held in others that due process rights were violated. We must examine the circumstances in each case that comes before us. In this case, the record reflects that the Assistant General Manager determined Claimant's guilt prior to issuing the discipline. This would have required her to evaluate her own testimony, which is violative of due process. See Fourth Division Award 4666. Additionally, because the General Manager conducted the Hearing and was the officer to whom the appeal was filed, Claimant would be denied the right to an independent review of any issues related to the conduct of the Hearing. See Fourth Division Award 4712. For these reasons, and without regard to the merits of the discipline, we must reverse the Carrier's actions.

In reaching this decision, we have noted that the Carrier has only two officers. This, however, would not have precluded it from obtaining the services of an outsider, such as an attorney or an official from another carrier, to serve as Hearing Officer. Such a precaution would have preserved Claimant's contractual right to due process.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1990.