

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

**RAILWAY PATROLMEN'S INTERNATIONAL UNION,
AFL-CIO**

THE NEW YORK CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM:

(a) That the carrier's action in suspending Patrolman Joseph A. Dobrowolski for a period of thirty days without pay was unwarranted, unjust and violative of agreement.

(b) That claimant shall have his record cleared and be compensated for all time unjustly held out of service.

OPINION OF BOARD: After an investigation conducted on May 28, 1965, the Claimant was suspended for thirty days without pay for violating on May 23, 1965 Rule 2017, Items (d) and (h) of the Government of the Carrier's Police Department pertaining to Insubordination and Failure of Good Behavior.

The material facts giving rise to the dispute were that the Claimant Patrolman, assigned to a cruiser car, on the night in question, sought to contact Sergeant Hinkel to relay certain information concerning a sick train passenger. In the course of the radio conversation, a dispute arose between these two officers, and the Claimant allegedly became abusive and used vile language toward the Sergeant. Sergeant Hinkel reported the Claimant's conversation to Lieutenant Morehouse, who in turn discussed the matter with Lieutenant Simms. Thereafter, Lieutenant Morehouse in a telephone conversation questioned the Claimant about the matter, with Lieutenant Morehouse listening in to the conversation on an extension telephone. After Lieutenant Simms' interrogation of the Claimant, the aforementioned charges were preferred against him which culminated in a formal investigation held on May 28, 1965.

The principal defense of the Organization to the discipline imposed upon the Claimant is that the Claimant did not receive on May 28 the fair and impartial hearing contractually guaranteed him under the provisions of Rule 13 of the Agreement. The Organization specifically complains that a meeting held on May 25, 1965 in the office of Chief of Police Feeley which was attended

by all the Carrier's witnesses, including Captain Rauth, the presiding officer of the investigation held on May 28, 1965. The Organization charges that all of the Carrier's witnesses were coached and thus offered identical testimony. The Organization further complains that the presiding officer dominated the hearing, asked leading questions, and prevented the Claimant from conducting his own defense in an effective manner, particularly by preventing the Claimant from cross-examining witnesses and examining the prepared statement from which Sergeant Hinkel testified.

The Organization further denies the substantive charge that the Claimant used vile and abusive language toward Sergeant Hinkel. It points out that a railroad yard is not a public library or an art gallery and language which is commonplace in a railroad yard might be considered profane elsewhere.

The Carrier, on the other hand, contends that the evidence of record clearly shows that the Claimant was guilty as charged, namely, that he used abusive and profane language toward his superior officer. The Carrier states that it cannot condone such conduct by any of its employees, much less by a police officer.

The Carrier further denies that the Claimant was not afforded a fair and impartial hearing. He was given the right to have a representative defend him but voluntarily waived that right. He was allowed to cross-examine witnesses, all of whom testified and were examined separately. Captain Rauth stated that, although he was present at the May 25, 1965 meeting in Chief Feeley's office, he did not participate in any of the discussions concerning the Claimant. Captain Rauth stated that there were also other matters discussed at this May 25 meeting.

When the Division reviews the total record, it must conclude that the procedural objections interposed by the Organization concerning the presence of the presiding officer at the preliminary meeting on May 25, 1965, are well taken. Without making any judgments on the other aspects of the May 28, 1965 hearing, the Division finds that attendance of the presiding officer at a prior meeting at which all the prosecuting witnesses were present, so tainted the subsequent investigation, that it must be held to be violative of Rule 13 which purports to afford the Claimant a fair and impartial hearing. The presiding officer cannot have any adversary role at an investigation hearing. He is obligated to seek out all the facts surrounding the incident in question, those which favor as well as those which militate against the Claimant. He is a trier of fact and an ascertainment of the truth. Consequently, for him to attend a preliminary meeting at which all the Carrier witnesses are present and the case under consideration is discussed is violative of Rule 13. It matters not that the presiding officer, himself, did not participate in such discussion. His mere presence there is incompatible with the role of a hearing officer seeking to find all the material facts of the incident in question.

While it has been stated in many awards of this Division, that carrier disciplinary proceedings will not be held to the exact standards of a common-law trial proceeding, nevertheless, it has also been stated with the same degree of frequency that the basic concept of fairness and due process must underly and be complied with in these same disciplinary proceedings. On the basis of the record before it, the Division must hold that the principles of procedural due process were materially breached by the meeting prior to the May 28, 1965 investigation and the discipline imposed as a result of the May 28 investigation must fall.

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

The carrier and the employe involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION**

**ATTEST: Muriel L. Humfreville
Acting Secretary**

Dated at Chicago, Illinois, this 2nd day of November, 1966.