

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 5150

UNITED TRANSPORTATION UNION  
and  
BURLINGTON NORTHERN RAILROAD

Case No. 4  
Award No. 4  
NMB Code 119

John C. Fletcher, Chairman & Neutral Member  
Jerry N. Locklin, Carrier Member  
M. M. Winter, Employee Member

Hearing Date - January 31 1992

STATEMENT OF CLAIM:

Claim of Superior Conductor M. J. McKenna for record clearance and pay for all time lost account suspended from service for a period of ten days effective October 27, 1990 to November 5, 1990, both dates inclusive, in connection with an alleged failure to contact Trainmaster of layoff for old Company injury at 6:45 p.m., Sunday, September 9, 1990.

FINDINGS:

Public Law Board No. 5150, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

The Organization raises a threshold issue concerning the impartiality of Claimant's investigation. It points out that the Conducting Officer and one of the witnesses (a Crew Caller) are father and son. Rule 40 (a) of the Agreement requires that before an employee may be disciplined or discharged he must be afforded a "full and impartial investigation." The Organization's point is well taken. Conducting Officer's must not only insure that investigations are impartial they must also maintain the appearance of impartiality at all times during the course of the investigation. Conducting Officers, in most if not all investigations, are required to make determinations on credibility of witnesses. These determinations must be impartially arrived at.

In the case before this Board the Conducting Officer (a Trainmaster) was required to make credibility determinations between testimony offered by his son (the Crew Caller) and Claimant. And while it may be argued that such determinations were correct, fairly arrived at and were fully supported by other evidence, they nonetheless lack the appearance of impartiality.

When the relationship between the Conducting Officer and the Crew Caller was established in the hearing record the Organization entered a protest against continuing further. At that point, fairness considerations would dictate that the Conducting Officer recuse himself from all further participation in the matter (or that a waiver be secured from the charged employee to continue). Neither obtained, accordingly, the entire process must be considered as flawed and a denial of the impartial investigation required by Rule 40.

The Claim will be sustained on the basis that the investigation was flawed when the Conducting Officer did not recuse himself because his son was a witness in the hearing. The merits or other substantive matters of the dispute are not judged.

### AWARD

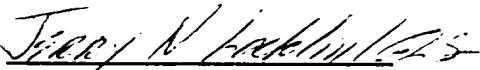
The Claim is sustained on procedural grounds. All references to the incident and discipline must be removed from Claimant's personnel records and he is to be compensated for all wages lost as a result of the investigation and suspension.

### ORDER

Carrier is ordered to comply with this Award within thirty days of the date two members of the Board affix their signatures hereto.



John C. Fletcher, Chairman & Neutral Member



Jerry N. Locklin  
Carrier Member



M. M. Winter  
Employee Member

Dated at Mt. Prospect, IL, this 21st day of March 1992.