

The Second Division consisted of the regular members and in addition Referee Bernard Cushman when award was rendered.

Parties to Dispute: { System Federation No. 76, Railway Employees'  
                          { Department, A. F. of L. - C. I. O.  
                          { (Carmen)  
                          { Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Coach Cleaner R. K. Davis was unjustly assessed fifteen days deferred suspension.
2. Coach Cleaner R. K. Davis was erroneously charged with failure to safely perform his duties, allegedly resulting in a personal injury.
3. That the Chicago and North Western Transportation Company be ordered to remove the fifteen (15) days deferred suspension from Claimant's record in accordance with Rule 35.

Findings:

The Second 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 waived right of appearance at hearing thereon.

The Claimant, R. K. Davis was employed by the Carrier at its California Avenue Car Maintenance Facility as a Coach Cleaner. On May 16, 1977, the Claimant while carrying some newspapers under his right arm and descending the stairs from the upper level of the passenger car twisted his ankle and was found to have suffered a sprained ankle, necessitating restricted duty for four days. By letter dated May 17, 1977, over the signature of J. F. Bowen, General Car Foreman, Claimant was notified to appear for a formal investigation on May 26, 1977. The letter stated the charge placed against him was:

"Your responsibility for your failure to safely perform your duties in that your failure to do so resulted in a personal injury to you on May 16, 1977, 9:45 A.M."

The investigation was postponed until June 2, 1977, and was conducted by the same James F. Bowen.

On June 14, 1977, the Carrier issued a discipline notice which advised the Claimant that he had been assessed fifteen days deferred suspension. The notice was signed by the same James F. Bowen. It further appears that Bowen stated at the investigation that he had checked the car. Bowen was the Investigating Officer. It further appears from the transcript of the investigation that Bowen filled out a portion of the accident report, and that after the injury was incurred, Bowen sent the Claimant to the doctor. Because of the multiple roles played by Bowen in this matter, the Organization contends that the Claimant did not receive a fair hearing. The Carrier contends that the Claimant did not use due care or comply with Rule M of the General Regulations and Safety Rules and Rules 44, 262 and 255. The Organization contends that Rules M, 44 and 255 were not mentioned in the handling of the case on the property and are not properly before the Board.

The Board's review of the transcript and the record indicates that Bowen played a substantial role in the investigation, that he preferred the charges, that he was the Investigating Officer, that he presented some evidence at the investigation and that he assessed the discipline. The question here was whether the Claimant failed to safely perform his duties. Under all the circumstances, the Board is of the view that on this record the defense of the Claimant was impaired and that there was not a fair and impartial investigation. As in Award No. 7886 between the same parties, the Board finds here that this is not an instance of a minor overlap of roles. Rather, the Board finds that the Hearing Officer "was also the principle Carrier representative responsible for determining that the Claimant was remiss in his duties." Where, as here, the Foreman activated the investigation, preferred the charges, held the hearing, made statements at the hearing, reviewed the record and assessed the discipline, he fulfilled the roles of investigator, prosecutor, and trial judge. Award No. 7119 holds in part:

"We have reviewed the conflicting awards cited by the parties on the question of multiplicity of roles by Carrier officers in discipline cases. We continue to adhere to our earlier general opinions that Carrier combines such functions in one individual at its peril; that some minor overlapping of roles, while not to be encouraged, is not prima facie evidence without more of prejudicial procedural imperfections; that the greater the merging of roles the more compelling the influence of prejudgment or prejudice and, that each such case must turn on its own merits. In the instant case we find that H. W. Sanders did not actually testify against Claimant in the hearing but that is literally the only function he did not fulfill in this matter. He activated the investigation, preferred the charges, held the hearing, reviewed the record, assessed the discipline, and denied the appeal. In so doing he fulfilled roles of investigator, prosecutor, trial judge and appellate judge. The disinterested development of evidence, the unbiased review

"thereof and the objective assessment of appropriate penalty inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions. This was not a mere technicality but a substantial denial of Claimant's rights. We are left with no alternative but to sustain the claim. See Awards 4536, 6329, 6439, 6795, and 7032."

The claim of failure to provide a fair hearing must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of September, 1979.