

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13426

Docket No. 13311

99-2-97-2-83

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood Railway Carmen, Division of Transportation
(Communications International Union**

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

- 1. "That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13 when they arbitrarily assessed Carman Errol Clement with a five (5) day suspension as a result of an investigation held on January 31, 1997.**
- 2. That, accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman Errol Clement for each workday he may be withheld from service commencing the date he is able to return to active service."**

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 were given due notice of hearing thereon.

On January 15, 1997, Claimant was notified to appear for an Investigation on February 4, 1997. The notice charged Claimant with failing to devote himself exclusively to the Carrier's service while on duty, failing to exercise care to prevent injury to himself, and failing to report a personal injury promptly. The notice alleged that the charges arose from an injury Claimant sustained while exiting his company truck at Christy's Market on January 8, 1997. The hearing was rescheduled to and held on January 31, 1997. On February 14, 1997, Claimant was advised that he had been found guilty of the charges and that he was assessed a five day suspension.

The hearing began with testimony from the Manager Car Maintenance, who was the charging officer. Upon completion of the direct examination of the charging officer, a lunch recess was taken. When Claimant and his representative returned to the hearing room from lunch, they found the door to the hearing room closed. When they opened the door, they found the two hearing officers; the charging officer; and the Director of Mechanical Safety and Rules, who was another Carrier witness and who had yet to testify, together engaged in conversation.

The Organization objected to the presence of two witnesses with the hearing officers behind closed doors outside the presence of the Claimant and his representative. The hearing officers represented that they were eating lunch together and that nothing concerning the hearing had been discussed. The hearing officers overruled the objection. Subsequently, the Director of Mechanical Safety and Rules testified that their conversation was confined to the general state of health care and world affairs.

The action of the hearing officers of having lunch during the middle of the hearing, behind closed doors and outside the presence of the Claimant and his representative, but with one witness who was in the middle of his testimony and another witness who had yet to testify was clearly improper. Rule 13.1 provides, "No employees will be disciplined without a fair and impartial hearing." There is no more fundamental component of a fair and impartial hearing than having the hearing conducted by a fair and impartial hearing officer. Not only must the hearing officer be impartial in fact, but he must avoid giving the appearance of partiality. See, e.g., Public Law Board No. 4554, Award No. 64.

We do not mean to suggest that during the luncheon the hearing officers and the witnesses actually discussed the case. Whether they did or not is immaterial. By engaging in an ex parte conversation and luncheon behind closed doors with one witness

who was about to undergo cross-examination and a second witness who had yet to testify, the hearing officers gave an appearance of partiality that is incompatible with fundamental concepts of due process. Accordingly, we find that this action tainted the entire investigation and that the discipline cannot stand.

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 Second Division**

Dated at Chicago, Illinois, this 16th day of June 1999.