

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20471
Docket Number CL-20381

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employes
(
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board of Adjustment (GL-7394) that:

1. Carrier violated the rules of the March 3, 1970 Rules Agreement by suspending Mrs. Diane M. Kubes, Senior Rate Analyst, Marketing Department, Burlington Northern General Office, St. Paul, Minnesota, from service for a period of five work days commencing August 14, 1972, and

2. Carrier shall now exonerate Mrs. Diane M. Kubes and reimburse her for the five day wage loss incurred while serving suspension from service, August 14 through August 18, 1972.

OPINION OF BOARD: On July 31, 1972, Carrier charged Claimant in writing with:

"...responsibility in connection with your alleged failure to report for work on Monday, July 31, 1972."

and investigation was set for and conducted on August 3, 1972. Under date of August 11, 1972, Mr. C. J. Hockaday, Assistant Vice President - Pricing, rendered the Carrier's decision in writing notifying Claimant as follows:

"This is to advise you are being suspended from the service of this Company for a period of five days commencing August 14, 1972, for failure to report for work in your position as Senior Rate Analyst July 31, 1972, notwithstanding repeated warnings regarding your absenteeism as developed in the formal investigation held August 3, 1972."

In discipline cases our function is to review the record in its entirety to determine whether: (1) in the discipline proceedings the due process provisions of the Agreement were satisfied; (2) if found guilty, in whole or in part, the finding is supported by substantial evidence; and (3) the discipline assessed was excessive for the offense.

Rule 56 of the Agreement provides, in part:

"The investigation shall be held in a fair and impartial manner."

On August 18, 1972, Local Chairman Fred E. Hawn appealed the decision of Mr. Hockaday (R83), stating in part:

"If you will call for all papers in the case, you will notice Mr. Hockaday was the Carrier's principal witness at the investigation and, as such, was then not able to make a fair and impartial decision based upon the testimony. On the contrary, Mr. Hockaday would be negating his own testimony had he arrived at a decision other than the one he did."

On August 25, 1972, General Chairman Robert M. Curran appealed the decision to the Carrier's Vice President Labor Relations (R86) stating in part:

"You will have to agree that there was no way Mrs. Kubes could get a fair and impartial judgment of the testimony when you consider the manner of procedure:

Mr. C. J. Hockaday made the decision of guilt in his letter of August 11, 1972. If you will review the testimony on page three you will note Mr. Hockaday judged Mrs. Kubes guilty of not making a reasonable effort to obtain a baby sitter. In effect, he sustained his own uncorroborated testimony as opposed to the confirmed testimony that Mrs. Kubes made a reasonable effort to secure a baby sitter. On page four, Mr. Hockaday again pre-judged Mrs. Kubes guilty when he stated:

'She did not call her supervisor, which is another violation of the rule.'

Yet he testified on the same page that she called her supervisors telephone number. Again on page twelve, Mr. Hockaday exhibited his prejudice when he testified he would deny Mrs. Kubes the same favorable consideration he would give other employes.

My examination of the transcript of the hearing has satisfied me that the investigation was conducted, not as a reasonable objective inquiry or pursuit of truth, but, as a formality required by the Agreement before announcement of a pre-conceived judgment. As such, it was unfair and the judgment resulting therefrom was arbitrary and unjust."

The Carrier, in its letters of August 22, 1972 (R85) and October 17, 1972 (R88) denying the Organization's appeals of August 18 and August 25, 1972, was silent on the due process questions raised. In letter of October 19, 1972, the General Chairman quoted additionally from the transcript of investigation and contended again:

"Mrs. Kubes was not afforded a fair and impartial hearing because of the display of manifest bias on the part of the Carrier Officers who reached a decision of guilty before the conclusion of the hearing."

Following conference on appeal, the Carrier reaffirmed its previous declination, again making no response to the Organization's clear raising of due process issues (Carrier's letter of November 27, 1972, R95). Not until its Rebuttal did the Carrier respond to the due process questions raised.

The record is clear that Mr. Hockaday, who made the Carrier's decision in this case, was called as witness by the Carrier (R20). He testified:

"Yes. The only authorized absence that I am aware of is available to employees is sick days on this time notice. I have asked Mrs. Kubes previously to adhere to the Office Rules, Regulations and hours of service and this was ignored on Monday, July 31. The reasons given for not appearing at work are not an authorized excuse. There are four professional babysitting services listed in the yellow pages of the St. Paul phone book. Mrs. Kubes, I believe, makes \$40.32 a day and should have made a reasonable effort to obtain a baby-sitter so she could fulfill her assigned duties on that day." (R20)

"I would like to say that a request for a leave of absence by an employee would generally be given a favorable consideration, however, this was a (sic) absence from duty was a common happening with Mrs. Kubes and even were it to be considered a request, I have written her two letters asking for full time attendance and I would have to say this request would have been denied." (R29)

Except for Mr. Hockaday's testimony, the only other witness of the Carrier was Mr. R. K. Larson who testified "To verify the fact that the Safety Rules were distributed to all employees and that he was in fact the one who distributed them." (R23) We must conclude, therefore, that Mr. Hockaday was in fact the Carrier's principal witness. The record

is clear, moreover, that Mr. Hockaday's testimony that: "The reasons given for not appearing at work are not an authorized excuse"; "Mrs. Kubes, I believe, makes \$40.32 a day and should have made a reasonable effort to obtain a babysitter so she could fulfill her assigned duties on that day"; "I would like to say that a request for a leave of absence by an employee would generally be given favorable consideration, however, ...I would have to say this request would have been denied"--is such testimony as honestly and frankly stated reflects a mind "already made up" that Claimant was guilty of the charge. Thus, the record shows (a) the Carrier's chief witness (b) evidencing an unequivocal state of mind of Claimant's guilt without benefit or weighing of the entire record of investigation (c) serving as the Carrier's decision-maker concerning Claimant's guilt and (d) rendering a decision of guilt and penalty.

Rule 56 of the Agreement provides:

"The investigation shall be held in a fair and impartial manner." This rule provides for dispassionate justice and reasonable procedures to secure the fundamental rights of the employees and the fundamental prerogatives of the management in the carrying out of discipline. Rule 56 cannot be construed as commanding mere formality or cosmetic device through which management channels a preconceived judgment or an arbitrary decision.

The Carrier argues (R115) that "it is fair to note that none of these men are trained in the law, and so may well not be sensitive to the more finely drawn lines of judicial propriety." This Board has in numerous cases respected the pragmatic and fair-minded view of management in discipline cases and has refused to overturn discipline because of some strained technicality, irregularity, or non-prejudicial error. We do not read Rule 56 as mandating the nullification of a proceeding where there might be found harmless error or technical irregularity committed by laymen in good faith in executing their responsibilities. Thus, in construing Rule 56, were we to find that the entire record affirmatively shows that an error or defect in the proceedings was without substantial influence on the result and was nonprejudicial since no substantial rights of an accused were affected, we would deem such an error to be "harmless error." An accused, however, has an unquestioned fundamental right to be judged by an impartial and unbiased person. This fundamental right is violated where the judge serves as key prosecution witness. Plain, every-day fairness condemns a procedure empowering the witness to be the judge of his own testimony and the testimony also of opposing witnesses. The denial of the accused's fundamental right to an investigation held in a fair and impartial manner renders the investigation and discipline null and void.

On reviewing the record before us in its entirety, we conclude that the due process provisions of the Agreement were violated. Accordingly, we do not reach the questions (2) whether the Carrier's finding is supported

by substantial evidence, or (3) whether the Carrier's assessment of discipline was excessive for the alleged offense.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1974.