

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20471
Docket Number CL-20381

Joseph Lazar, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station **Employes**

PARTIES TO DISPUTE: (

(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 8 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 Resident 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 **employees**.

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 8n 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 **leave of absence** by an employee **would generally be given a favorable consideration**, however, this was 8 (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 (8) 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 the 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, 8s 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:


Executive Secretary

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