

The Second Division consisted of the regular members and in addition Referee Barbara W. Doering when award was rendered.

Parties to Dispute: { International Association of Machinists and
 { Aerospace Workers
 { Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Carrier be required to remove the one (1) day suspension (deferred) from Machinist A. B. Crosby's record.

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.

Claimant, whose rest days were Monday and Tuesday, had been disciplined twice for the weekend absences in his 8 months in the M. of E. Department prior to the March weekend in question. In October 1979 he had been reprimanded for using sickness as a subterfuge for a Sunday absence (September 16, 1979) and for a Saturday-Sunday absence (September 29 and 30, 1979). A month and a half later he was again absent on a Sunday (November 18, 1979) for which he was given a 2 day suspension, later reduced to a reprimand for unauthorized absence.

The incident in question occurred in March 1980 when he was absent on Saturday and Sunday the 15th and 16th, having called in sick. On March 28th Carrier issued a Notice of trial in connection with "using sickness as a subterfuge" for these absences and a hearing was held on April 10, 1980.

At the hearing Claimant insisted he had had the flu on the weekend in question and, at the time, not felt it necessary to see a doctor, but had merely taken aspirin or some other non-prescription medication and gone to bed. After receipt of Carrier's Notice he went to a doctor on April 9th and obtained a slip stating he had been under the doctor's care from March 13, 1980 to March 16, 1980.

The Carrier's case rests largely on the doctor's slip and Claimant's admission that he did not go to the doctor until just before the hearing some 3 weeks after the alleged illness. While Carrier admits that bed rest and aspirin is often sufficient to overcome an illness, in this case it argues that Claimant had a history of becoming ill on the weekend days immediately preceding his rest days and in view of past discipline he should have recognized the need

to substantiate such alleged illnesses in the future. A non-specific doctor's excuse written 3 weeks after the fact, purporting to cover not only the 2 days missed but an additional 2 days for which Claimant does not allege any illness, is evidence, the Carrier contends, of subterfuge.

The Organization strenuously objects to use of Claimant's past record in the matter of proving the charge. The Organization points out that while the past record may be used to determine the degree of discipline once guilt has been proven, it is highly improper to use it as evidence of a propensity to commit the infraction. Carrier has the burden of convincingly proving its charge, and mere suspicious circumstances do not take the place of evidence (Second Division Award 4046). The Organization contends that, without considering the past record, the evidence is insufficient to support the charge of using sickness as a subterfuge and the claim should therefore be sustained.

While the Board agrees with Petitioner that the fact that an individual has a history of past infractions similar to the one charged does not prove guilt in the charged offense (Third Division Award 23329), nevertheless it is not unreasonable to expect that as a result of past discipline for similar offenses the employe will take precautions to see that his future conduct in similar situations not be subject to misinterpretation. In the case of prior discipline for absences immediately preceeding rest days, it seems reasonable that the employe would not expect the Carrier to accept a claim of illness on his unsupported word, but would see a doctor to make sure there were no questions. If a doctor is not seen, at least a friend or family member ought to be available to corroborate in some detail the fact that the employe was indeed physically incapacitated.

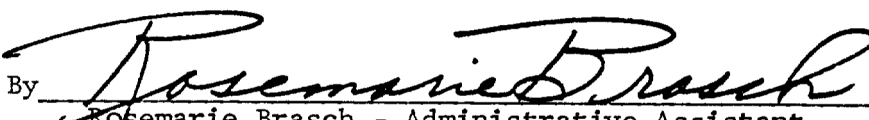
In this case Claimant made the mistake of securing a doctor's slip alleging in the most general terms that he was under professional care at a time he admits he had not gone to the doctor. In view of his testimony, the Board cannot find that Carrier acted arbitrarily in refusing to give the doctor's slip any weight and absent any other verification of the alleged illness, the one day deferred suspension was not improper and the claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of May, 1983.

Labor Members' Dissent To Award No. 9477 -

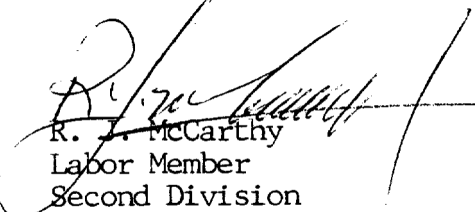
Docket No. 9619, Barbara W. Doering, Referee

The majority reached its decision that a denial Award was appropriate in this instant dispute "as a result of past discipline for similar offenses."

As is stated in the Award, "the Organization strenuously objects to the use of Claimant's past record in the matter of proving the charge," and "while the Board agrees with petitioner that the fact that an individual has a history of past infractions similar to the one charged does not prove guilt in the charged offense," the majority, nevertheless, "as a result of past discipline for similar offenses" denied Claimant's appeal.

Past discipline is Claimant's past record. In this dispute Claimant's "past record" and "past discipline" is synonymous. Carrier did not prove its charge against Claimant with "reasonable evidence" that he was not sick on the days included in the charge and, therefore, used illness as a subterfuge. Mere suspicious circumstances do not satisfy Carrier's Burden of proof. (Second Division Award No. 4046).

The reasoning upon which this award was determined flies in the face of the Doctrine of Burden of Proof. Consequently Award No. 9477 to Docket No. 9619 is palpably erroneous and of no precedential value, and to which this dissent is filed.


R. J. McCarthy
Labor Member
Second Division