

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24590
Docket Number CL-24730

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employes**
(
(Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-9623) that:

(1) Carrier violated the Agreement between the Parties when it dismissed Mr. D. L. Fritch, Extra Clerk, **Indianapolis**, Indiana, as a result of hearing for allegedly submitting a falsified Doctor's certificate in order to collect sick pay, and

(2) Because of such impropriety, Carrier shall be required to reinstate Claimant D. L. Fritch to its service with all rights unimpaired, his service record cleared of the charge, and to compensate him for all lost wages beginning May 19, 1981 and continuing until reinstated to Carrier's service, and

(3) The Carrier shall be required to **reimburse** Claimant D. L. Fritch for sick payments previously allowed, and later recovered. by Carrier and covering dates of March 26, 27, 31; April 1, 2, 3, 4, 5 and 6, 1981.

OPINION OF BOARD: Claimant was absent from duty due to alleged illness from March 25, to April 6, 1981. On his **return** he was asked to provide a statement substantiating his claim for sick pay as provided under Rule 22. Claimant submitted a work release statement signed by Company **Doctor Sluss** which appeared to have been altered. On discovery of the apparent alteration, Carrier notified Claimant under date of April 16, 1981 to attend an investigation into charges set forth as follows:

"... responsibility in connection with submitting a falsified doctor's certificate dated April 9, 1981 in order to collect sick time payment for March 26, 27, 31, and April 1, 2, 3, 4, 5, 6, 1981."

Hearing was held and Claimant was represented by Local Chairman **Tackett** who took part in questioning witnesses. The Brotherhood **argues** that the notice of hearing was **sent** to Claimant by Chief Train Dispatcher **Spillman**, the hearing was conducted by Dispatcher Bush and the dismissal notice was sent to Claimant over the signature of W. A. Adams, Assistant Superintendent of Operations. The fact that Carrier used different officials does not in and of itself provide a basis to claim the hearing was not fair and impartial as required by Rule 22. This is a procedural point in which Carrier is not limited by any specific provisions of the rule. Thus, as determined in another Third Division Award No. 21017, with Referee **Lieberman**:

"Further, Petitioner objects to the fact that the **conclusion** of guilt and assessment of penalty was rendered by a person other than the Officer who conducted the hearing.

With respect to the procedural issue, Carrier asserts that it is its practice to have the hearing officer's review of the facts and his recommendation passed to another officer for concurrence and issuance of the final verdict, which took place in this dispute. Additionally, there is nothing in the agreement that prescribes who shall prefer the charges, conduct the hearing or who must render the decision and assess the discipline. This Board has dealt with this issue on numerous occasions and we do not **concur** in Petitioner's objection (**see** Awards 16347, 20828, 20602 and 18106 **among** a host of others).*

The doctor certificate submitted by Claimant to justify payment of sick pay had been altered in the judgment of Carrier. This judgment was made on the basis of examination, conversations and a statement by Dr. Sluss. On this basis, Carrier took action to cancel time slips for sick pay which had originally been approved. It is not reasonable to conclude from this action that Carrier was prejudiced in its conduct of the **hearing** as required under Rule 22. It does, however, attest to the fact Carrier had reasonable doubt as to the authenticity of the doctor certificate.

Claimant admitted he was not treated by Dr. Sluss during his absence due to alleged illness. **He** also admitted he submitted the doctor certificate covering the period and could not explain the apparent alteration of the dates. At the hearing it was established Dr. Sluss had issued a release certificate for Claimant on December 4, 1980.

Carrier's investigation of the matter prior to the hearing included checking with Dr. Sluss who prepared the following statement which was included in the transcript of the hearing:

"In compliance with your request for statement regarding the above, Mr. **Fritch** was last examined 1/9/80 and has not been observed since

A copy of release to work was sent 12/4/80 and appears to have been changed to 4/9/81."

The Brotherhood argued Dr. Sluss did not keep reliable records but did not submit proof in support of its position. Moreover, Claimant's admission that he did not see Dr. Sluss during his period of alleged illness from March 25 to April 6 lends support to statement of the doctor. The conflict in the testimony between Claimant and the doctor, is not for this Board to determine. The fact that Carrier accepted the doctor's testimony as a basis for its findings of guilt appears to have been based on sound judgment and a reasonable appraisal in the circumstances. It is not the function of this Board to resolve conflicts in testimony. This issue has been determined many times in countless awards. Thus, Third Division Award No. 22721 by Referee Sickles held:

"Once again, this Board is asked to review conflicting evidence and determine that the claimant's version of a disputed factual circumstance be accepted **and** that the Carrier's version be rejected. We have noted in numerous Awards that this Board is not constituted to make such determinations.

Issues of credibility must be determined by those who received the evidence and testimony, and we would have no basis for substituting our judgment in that regard."

and Third Division Award No. 21278 (Wallace), where the Board held:

"There is a conflict in the testimony here and the carrier chose to **believe the** version advanced by Mr. Smith rather than the claimant. We cannot say this was wrong. This Board functions as a **reviewing** authority and it cannot substitute its version of the facts for that reached by the trier of facts who heard the testimony, observed the demeanor of the witnesses and, by its proximity, was entitled to weigh and evaluate the credibility of witnesses. **So** long as the conclusions reached are based upon substantial evidence in the record they should not be overturned."

On the basis of **our** review of the evidence both as to the hearing required by Rule 22 and the dismissal action we find that Claimant was accorded his rights of due process. The evidence on which the dismissal action was based is substantial and meets the burden of proof on the Carrier in disciplinary actions such as here involved. The falsification of a medical certificate for the purpose of collecting sick pay is clearly an act of fraud perpetrated to gain dishonest advantage. In these circumstances we are of the opinion that the dismissal action was for just and reasonable cause.

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 Employees involved in this dispute are respectively Carrier and Employees 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

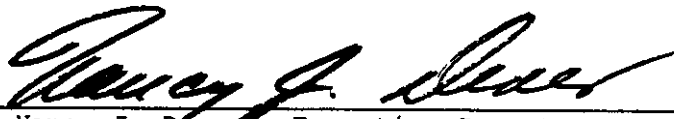
That the Agreement was not violated

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1983.