

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

Parties to Dispute: ( International Brotherhood of Fireman and Oilers  
(  
( Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Laborer G. L. Benson Council Bluffs, Iowa, was unfairly dismissed from service of the Chicago NorthWestern effective November 9, 1981.
2. That accordingly, the Carrier be ordered to make Mr. Benson whole by restoring him to service with seniority rights, vacation rights, and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service; and the mark removed from his 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 employees 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.

The Claimant, G. L. Benson, was dismissed from the Carrier's service effective November 9, 1981. On October 24, 1981, the Claimant, working as a laborer, claimed he sustained a back injury while handling a 485 pound drum of soap. Arrangements were made for him to be examined at the clinic when it opened at 8:30 A.M. He was x-rayed and given muscle relaxants. The Claimant reported to work on Monday, October 26, 1981, but went home. On October 27, he was placed on a light duty assignment at his request. On November 3, 1981, Claimant was notified to report for an investigation: the charge being as follows:

"To determine the facts concerning your alleged personal injury on October 24, 1981, at approximately 4:30 a.m. while employed as a laborer, Job #103, at Council Bluffs Diesel Shop."

Thereafter, he was dismissed.

The Organization claims the evidence adduced at the hearing on November 3 does not support the findings of the Carrier. It is asserted by the Organization that the Claimant did injure his back on October 24, 1981, and properly reported the injury. According to the Organization, the investigation was extremely vague and little time was spent to determine the facts concerning the claimed injury. The Organization argues the Carrier's main preoccupation was to show the Claimant played football after his injury.

The Carrier contends the evidence establishes the Claimant played "flag football" on October 25 and November 1 and that the Claimant denied doing so. After this testimony and the submission of photos showing Claimant exercising and playing, he then admitted he did play on November 1, 1981. The Carrier asserts it is evident from a review of the transcript of the investigation that Claimant falsely advised Carrier that he received a job related, personal injury.

We agree with the Carrier's position concerning the Claimant's testimony. Having denied he played football, the Claimant then changed his story. The Carrier believes this attempted deception destroys his credibility and establishes no injury took place. Singularly, the Carrier responded to the Organization's initial claim on December 29, 1981, and stated, as follows:

"Investigation reveals and, was substantiated, that Mr. Benson did engage in obvious strenuous exercise following his alleged injury after company physician informed him to rest the couple of days following his injury. This was evidenced by witnesses and photographs. Mr. Benson did not follow the company physician's instructions and allowed himself to possible further injury. ..."

On January 27, 1982, the Carrier, responding to the Organization's January 11, 1982, appeal concluded from the testimony of the Special Agents that, if Claimant was injured, it was not to the extent he claimed.

This Board's review of the record agrees with the Carrier's initial response of December 29, 1981; namely, that Claimant did not follow the Carrier physician's orders to rest the two days following his claimed injury of October 24, 1981. However, we find no meritorious basis to support the Carrier's jump in logic that, finding the Claimant to have attempted to conceal his participation in a football game, it axiomatically can be concluded he was not injured. There is absolutely no testimony showing the Claimant's foreman, the General Foreman, or the Carrier physician questioned the occurrence of an injury.

Finding no support for the Carrier's charge the Claimant falsely claimed a job related injury, this Board recognizes the Carrier's concern and charges with respect to the Claimant's conduct following October 24. By participating, albeit limitedly, in a football game, the Claimant did not act in his best interests nor in those of the Carrier's. He failed to follow the instruction of the Carrier physician and exposed himself to the possibility of aggravating his back injury. Such conduct merits disciplinary action. Yet, under the limited circumstances of this matter, these actions do not support a penalty of discharge notwithstanding Claimant's prior, poor record.

The Claimant's termination is reduced to a disciplinary layoff without pay and he is to be restored to service. This long disciplinary layoff should serve notice to the Claimant that, in the future, he will be held responsible for all of his actions as an employe and must conduct himself in accordance with all established rules.

A W A R D

Claim sustained to the extent set forth in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of March, 1984.