PUBLIC LAW BOARD NO. 2366

DOCKET NO. 44
AWARD NO. 32
CASE NO. 1465 MW
FILE: A1-136-T-81

PARTIES TO DISPUTE:

Illinois Central Gulf Railroad

and

Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM

"(1) The dismissal of Foreman C. O. Prine was without just and sufficient cause.

(2) Foreman C. O. Prine shall be reinstated with seniority and other rights unimpaired and compensated for all wage loss suffered."

OPINION OF BOARD

On June 30, 1981, the Claimant was notified to attend an investigation concerning an allegation that he "layed-off under false pretense...by falsifying an alleged personal injury; also for obtaining pay for this time under the false pretense that you were unable to work because of the alleged injury." Subsequent to the investigation, the Employee was dismissed from service.

The record indicates that on June 19, 1981, the Claimant was advised that his services were needed on the next day, however the Claimant advised that he did not desire to work that weekend.

Thereafter, the Claimant, who usually rode on the engine to spot areas that needed slag, due to a previous foot injury, helped unload slag, and he claimed that he slipped on some fresh slag and re-injured his foot. Subsequent to a visit to the Claimant's doctor, a medical certificate was presented stating that the Claimant was able to return to work on June 23, 1981.

However, the record indicates that the Claimant played in two tournament softball games on June 20, 1981.

Shortly thereafter, a Carrier Claim Agent and the Claimant settled the amount involved in the injury to the foot for $450.00.

The Employee admitted to playing the softball tournament and further, he admitted accepting the $450.00 settlement because, he asserts, he would have worked on June 20, 21 and 22.

The Carrier asserts that if the Claimant was able to play softball on June 20, 1981, he "must have been well enough to spot work." Implicit in that contention is the assertion that the Employee feigned an injury, and thereby fraudulently collected $450.00 under a pretense.

The Claimant insists that he did, in fact, injure his foot and that he assisted in the movement of the slag because of a suggestion that the Claimant might not be performing his job properly regarding the requested presence on the coming weekend. Further, he insists that his participation in a slow pitch softball game is not inconsistent with the asserted injury which was verified by a medical practitioner.

Regardless of whether or not the practitioner was a "Company doctor" or merely a practitioner that the Company utilized on occasion, there is no question that he did certify that the individual was unable to work for a period of time. We will certainly concede that suspicions are aroused when an individual is unable to work for medical reasons, but he then engages in some sort of physical recreational activity. But, we have been careful to contemplate the precise charge against the Employee. He was not charged with disloyal or improper activity by participating in physical exercise when he was injured; but rather, he was charged with "false pretenses" and falsification of the alleged personal injury. Those allegations speak in terms of "fraud", and we would require some specific showing of a deliberate falsification, rather than an action which could be described as unwise.

While we have no intention of minimizing the physical activity of anyone, the fact remains that a pitcher in a slow pitch softball game does not necessarily exert great amounts of physical effort, and it is not totally inconsistent that an individual who was hurt could participate in a tournament game. There is specific showing of the medical certification and an absence of a showing of precise physical activity on the part of the Employee – other than the fact that he pitched in the tournament.

We will set aside the termination for a failure of presenting sufficient evidence to prove an actual fraud. The Employee's very unwise decision to participate in a sporting activity while injured prompted this action, and we cannot say that the Carrier was totally without justification for being concerned. Accordingly, we will not award back pay.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

1. The termination is set aside.

2. The Claimant shall be restored to service with full retention of seniority and other rights, but without reimbursement for compensation lost during the period of the suspension.

3. Carrier shall comply with this Award within thirty (30) days of the effective date hereof.

Joseph A. Sickles
Chairman and Neutral Member

J. S. Gibbins
Carrier Member

Hugh G. Harper
Organization Member

2/23/82
DATE