

Award No. 3837

Docket No. 3792

2-C&O-MA-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William E. Doyle when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Machinists)**

**THE CHESAPEAKE & OHIO RAILWAY COMPANY
(Southern Region and Hocking Division)**

DISPUTE: CLAIM OF EMPLOYEES: 1—That under the current agreement Machinist Arnold G. Miller was unjustly withheld from service from December 1, 1959.

2—That accordingly the Carrier be ordered to restore this employe to service with all seniority rights unimpaired and paid for time lost retroactive to December 1, 1959.

EMPLOYEES' STATEMENT OF FACTS: Machinist Arnold G. Miller, hereinafter referred to as the claimant was employed by the Chesapeake and Ohio Railroad Company, hereinafter referred to as the carrier, with a seniority date of 9-2-43, as such, at its Huntington, W. Va., shops, which is confirmed by the seniority roster of 1-1-60.

On February 14, 1956, Mr. Miller injured his back, for which he underwent surgery, after which the claimant worked for a short period of time. He then again obtained a sick leave. This was on or about October 1, 1957. The claimant reported for work on November 27, 1959, stating he wished to go to work when the shops reopened on December 1, 1959, which the carrier had refused.

On or about October 23, 1959, the claimant requested information from Dr. Brandabur, carrier's chief surgeon, if he would have to have a re-examination before returning to work. Dr. Brandabur advised him he would not unless it was requested by the Shop Superintendent J. L. Savage.

On October 26, 1959, the claimant accompanied by Local Chairman J. C. Childers, met with Shop Superintendent J. L. Savage, who stated it would be the position of the carrier that they would assist in placing the claimant on work which would not hurt or aggravate his condition.

(3) Miller convinced the carrier that he had an unstable back, was not able to work and that it would be necessary for him to undergo a successful spinal fusion operation before being able to meet carrier's physical qualification standards for employes.

(4) Carrier accepted Miller's statement as to his physical condition and made a sizeable monetary settlement on the basis thereof, and Miller is now estopped from taking any position inconsistent with the position relied upon by him in settlement of his suit for damages. Carrier, therefore, urges that the claim of the employes be denied in its entirety.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 were given due notice of hearing thereon.

Claimant suffered a back injury on February 14, 1956 but continued working until December 10, 1956.

He underwent surgery for spinal fusion on February 15, 1957. Subsequently he brought a court action for damages. He there alleged that " * * * his ability to work and earn money in the future has been greatly diminished and impaired if not destroyed." Negotiations looking to settlement were conducted and in the course of these negotiations evidence was produced indicating that claimant would have to have additional surgery. A compromise settlement in the amount of \$51,000.00 was agreed to on November 12, 1959. On November 27, 1959 claimant requested that he be returned to duty. Carrier refused his request on the ground that he had for the purpose of the settlement represented himself as physically disabled.

As a basis for its present opposition Carrier asserts that an equitable estoppel arises (1) from the representations by course of conduct and otherwise that he was unable to return to work, (2) their reliance thereon plus (3) detrimental action—payment of the settlement based on that assumption.

It appears from the record that claimant's seniority has continued and that evidence was presented to the Carrier showing his ability to resume his duties. The Carrier has not examined claimant but is content to rely on his pre-settlement assertions as to seriousness of his condition. From this fact the Employes contend that the Carrier's refusal to reemploy claimant is arbitrary.

Prior to the agreed settlement, the question of whether claimant would resign was considered and it appears indisputably that the understanding between the parties to the litigation was that he would not be required to resign or give up his seniority rights. In negotiating the settlement, the Carrier demanded that claimant resign but later acceded to his refusal and settled the case. Nevertheless, the two physicians opinions used in consummating the settlement stated that the spinal fusion operation was not successful and that another operation would be necessary. Counsel for Carrier made it clear at the pre-trial that it was not the company's policy to permit employes with unstable

backs to return to work and "I did not believe that Mr. Miller could return to work until he had submitted to another operation and it was determined to be successful."

In order for an equitable estoppel to exist three requirements must be presented. (1) A material misrepresentation of fact, (2) Reliance thereon by the representee, (3) A resultant positive detrimental change of position. In the instant case No. 3 is clearly established but the sufficiency of the evidence as to (1) and (2) is questionable.

As to No. 1, the misrepresentation of fact. The evidence although not strong might also be sufficient to satisfy this. Carrier has stated that the misrepresentation was that a further operation was required. This would of course be merely a promise to get an operation and would be inadequate. It might be said that the misrepresentation was that claimant was presently disabled to return to work as evidenced by opinions of the two physicians and is also evidenced by his conduct in not having returned to work and in implicity, at least, taking the position that he was then completely disabled. He refrained, however, from saying that he would not request work in the future.

The focal point in the case is the element of reliance. The evidence is not sufficient to establish a justifiable reliance. Claimant did not claim total permanent disability. Moreover, Carrier bargained for a resignation and failed to get it. The Carrier must have considered it significant that claimant insisted on retaining his seniority rights. Under these circumstances there can be no reliance.

(Having failed to obtain a stipulation to resign at the time the F. E. L. A. suit was settled, Carrier will not now be heard to complain about the consequences of this failure.)

(Claimant has a right to apply for reemployment and carrier cannot refuse to evaluate his capacity to work. If it appears that he is capable he must receive recognition in accordance with his seniority rights. If it should appear that he had capacity as of the time of his prior application, and that his seniority rights would have allowed him to work he will have a claim for reimbursement of lost wages.)

It is conceivable that Miller's position on the seniority roster or his physical abilities will not allow him to return to service. He is nevertheless entitled to have these matters evaluated in order that he may have an opportunity to exercise his rights. The Claim is sustained to the extent indicated and is remanded for further proceedings.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September, 1961.