

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Akron, Canton and Youngstown Railroad Company

Dispute: Claim of Employees:

1. That the Carrier violated the provisions of the working Agreement when they refused to allow Carman Walter G. Riffle to return to the service of the Carrier, beginning with May 19, 1978, after supplying the Carrier with three (3) Doctors' statements.
2. That accordingly, the Carrier be ordered to reimburse Carman W. G. Riffle for all wages for five (5) days a week, all overtime losses, all vacation rights, sickness and health benefits, dental plan and any and all other protection afforded a working employee and, that this claim be considered a continuous running claim, until Claimant is made whole and reinstated to his employment on the Akron, Canton & Youngstown Railroad.

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 waived right of appearance at hearing thereon.

On November 27, 1974, the Claimant, Carman Walter G. Riffle, filed a two count FEIA suit against the Carrier in the U.S. District Court. Count One of the complaint alleged that Mr. Riffle had suffered a permanent impairment of his earning capacity as a result of his exposure to Nitro-Benzene while working on February 9, 1972. Count Two alleged that on or about September 18, 1973, the Claimant was injured when he attempted to lift a "re-railer" suffering "a forceful twisting and straining of his back, hips, and legs," and the complaint stated that as a result, Mr. Riffle was totally disabled from his regular railroad work and suffered a permanent loss of his earning capacity. The Complaint sought \$450,000 in damages. A deposition was taken from the Claimant on May 8, 1975, and a deposition was taken from the Claimant's physician, Dr. Buel S. Smith on July 28, 1975. Dr. Smith expressed his opinion that the Claimant was suffering from a "permanent disability". Soon after the taking of Dr. Smith's deposition, the parties agreed on a settlement of the FEIA case in the amount of \$50,000. Mr. Riffle signed a release dated August 28, 1975. The record indicates that Mr.

Riffle was 57 years of age when injured on September of 1973 and 59 when the settlement was reached.

Mr. Riffle applied for a disability annuity from the Railroad Retirement Board; and on January 2, 1975, he was awarded a disability annuity retroactive to November 4, 1973.

On February 7, 1977, Mr. Riffle contacted the Carrier's Superintendent of Equipment requesting that he be allowed to return to work, which request was denied. The instant claim was filed on May 19, 1978.

The Organization contends that the Claimant did not give up his seniority, and that the Carrier did not settle on the basis of taking away the claimant's seniority. The Organization contends that the Claimant has now had his health restored and can perform a normal day's work, as attested to by three different physicians. The Organization contends that the Claimant has a right to return to work once it is established that he is well enough to perform the duties of his trade.

The Carrier contends that the claim is barred because it was not handled in accordance with the applicable time limits. The Carrier contends that the Claimant is estopped from alleging that he was capable of returning to work because of his previous contradictory position that he had been permanently disabled as a result of injuries sustained in the course of his employment.

From the record available to this Board, it is clear that the Claimant's FEIA suit against the Carrier alleged that the Claimant, Mr. Riffle, was totally disabled from his regular railroad work and had suffered a permanent loss of his earning capacity. The Claimant himself testified in a deposition as to his inability to lift. The Claimant's physician testified just prior to settlement that the Claimant was suffering from a "permanent disability". At the time of the settlement, the parties were all aware that the Claimant had received a disability annuity dated January 2, 1975, retroactive to November 4, 1973. Contrary to the Claimant's position and that of his physician at the time of settlement of the FEIA suit, the Claimant now contends that his injuries were not permanently disabling. We find that the doctrine of estoppel as set forth in Public Law Board No. 652, Award No. 1 (Mesigh), is applicable to the instant case. Please see as well other Awards of this Board and Public Law Boards on the doctrine of estoppel (Second Division Awards Nos. 1672 and 1683 (E. F. Carter), 5511 (Ives), 6219 (McPherson), 7976 (Van Wart)). Third Division Awards Nos. 6215 (Wenke), 13524 (O'Gallagher) and 22598 (Searce). We are compelled to deny this claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of June, 1981.