

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(National Railroad Passenger Corporation

Dispute: Claim of Employees:

1. That under the current Agreement the National Railroad Passenger Corporation (Amtrak) improperly holds New Haven, CT Lineman G. Esposito from service as of December 16, 1983.

2. That accordingly, the National Railroad Passenger Corporation be ordered to restore Lineman G. Esposito to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Lineman rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole.

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 employes 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.

The Claimant, a Lineman in service with the Carrier since October 18, 1976, was injured while on duty on September 25, 1979. The Claimant returned to work for a short time during 1981 and was unable to perform all the duties of a Lineman. He ultimately filed a FELA complaint to recover damages from his permanent disability, and during 1983 was awarded by a jury \$90,000 in

settlement of his Claim. Medical testimony and arguments made by the Claimant's attorney at the Hearing indicated to the jury that the Claimant was permanently disabled and would never be able to perform all of the duties that are required of Carrier Linemen. Shortly after the jury's award, the Claimant's physician reported that the Claimant was free of symptoms and could return to work. On October 13, 1983, the Carrier's Doctor Roth initially cleared the Claimant, but four days later rescinded his original diagnosis and reaffirmed this second diagnosis on December 16, 1983. The Organization requested, on January 9, 1984, an examination by a neutral doctor. However, on January 25, 1984, the Claimant's own physician, Dr. Kaplan, would not certify the Claimant for climbing poles. On February 23, 1984, the Organization's request was denied. During August of 1984, the Claimant again asked for a return to duty physical and was again denied this opportunity.

The Organization claimed a violation of Rules 21 and 22. The Rules are quoted below:

"Rule 21 Return from Leave, Temporary Assignment, and Absence:

(a) Employees returning after leave of absence, sick leave, military service, disability annuity, vacation or from temporary assignment, including vacation or other temporary relief service on covered, official or excepted positions, who have been absent from their regular assigned positions 180 consecutive days or less, may resume the last position to which assigned, provided they have not been abolished or filled by senior employees in the exercise of displacement rights or may, upon return, exercise displacement rights on any position bulletined during their absence.

(b) Employees whose permanent assignments have been abolished or filled by senior employees in the exercise of displacement rights, or who have been absent from their regular assigned position in excess of 180 consecutive days may, upon their return, exercise displacement of junior employees. Other employees displaced under this rule may exercise displacement over junior employees. Employees who do not perform service for the Company for 180 days or more may be required to submit to a physical examination to determine their physical fitness for service.

Rule 22 Physical Examination and Disqualification:

(a) Employees, after completing 60 calendar days of service, will not be required to submit to physical examination unless it is apparent their physical condition is such that an examination should be made.

(b) When employees are removed from their positions because they are no longer physically able to perform the duties thereof, they shall be notified in writing the specific medical reasons for such removal. If the employees dispute the medical findings, they or their representative shall, within 15 calendar days, request an examination by an impartial medical doctor, not an employee of the Company, selected jointly by the Company appointed doctor and the employee's doctor and the case will be disposed of on the basis of his findings. Costs for such impartial doctor shall be equally divided by the Company and the employee.

(c) Employees returned to service or returned to their positions on the basis of the decision of the impartial doctor will be made whole for all wages lost due to the disqualification, less any outside earnings, with all rights unimpaired."

The Organization stated that under these Rules the Claimant has a right to a Third Party impartial doctor to review his status. The Organization argued the Carrier's physician was unduly influenced and the Claimant was not given a proper examination. The Organization noted that the settlement of the disability Claim did not require the Claimant to give up his seniority. The Claimant is on a medical leave of absence. Finally, the Organization argued that the procedural objection raised by the Carrier was not argued until the second level and therefore should not be considered by the Board.

The Carrier argued the Claim was not handled in the usual manner in that it was presented to the Assistant Division Engineer rather than the Division Engineer as required. The Carrier's main argument concerned that of estoppel. As was noted above, the Claimant and his physicians testified at his disability Hearing that the Claimant was permanently injured and could never return to full duty. This obviously entered into the jury's deliberations and resulted in a \$90,000 award to the Claimant. The Carrier stated that Rules 21 and 22 do not apply in that Rule 21 gives no right to return to duty after a physical disqualification, and Rule 22 only applies to the Carrier's removal of an individual, and this individual removed himself.


Upon complete review of the evidence, the Board finds the procedural argument raised by the Carrier is not persuasive, and therefore the Board will proceed on the merits of this case. Obviously, the major argument left to the Carrier is one of estoppel. Is the Claimant precluded from claiming a recovery after having pleaded that he was permanently disabled? There are many awards involving incidents that are exactly on point in this case in the First, Second and Third Divisions; in Public Law Boards, and in the Courts. The Rulings are extremely consistent. That is, a Claimant who claims a permanent disability is estopped from claiming the contrary in a subsequent matter. The Board finds that this is not a disciplinary case, and notwithstanding the Carrier physician's original certification to return to work on October 13, 1983, the Board finds that under the principle of estoppel, this Claim shall be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of May 1987.