

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

PARTIES TO DISPUTE:

(
(The Cheseapeake and Ohio Railway Company

STATEMENT OF CLAIM:

1. That Painter Helper Michael D. See was unjustly and excessively withheld from Carrier service after he notified that he was returning from sick leave and was examined by Carrier's physicians.

2. Accordingly, See is entitled to be compensated eight (8) hours pay at pro rata rate for each work day from the date April 24, 1984 until returned to Carrier service, compensated for lost overtime work opportunity, vacation rights and all other benefits that are a condition of employment unimpaired. Also, reimbursement of all losses sustained account loss of coverage under health and welfare and life insurance agreements during the time held out of service.

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.

After allegedly sustaining an on-the-job injury on June 6, 1981, the Claimant remained off duty. The record developed on the property reveals that, on April 5, 1984, the Carrier's Chief Medical Officer, Joseph A. Thomasino, M.D., wrote to the Claimant, stating that he had been provided a report of examination by Dr. K. R. Thompson, an Orthopedist, which had been conducted on March 27, 1984. This report indicated that it appeared that the Claimant's back condition was such that it would not preclude him from returning to duty. The Claimant was asked to arrange for a return-to-duty examination with Dr. F. Gwinn, one of the Carrier's physicians.

On May 16, 1984, the Claimant submitted a claim to the General Plant Manager of the Raceland Car Shops, which in pertinent part stated:

"I was injured June 6, 1981, while on duty at Raceland Car Shops as a Painter Helper, Michael D. See, ID 2621991. After full recovery from my injury which was stated by Dr. K. R. Thompson, Orthopedist of Lexington, Ky., which Dr. Joseph A. Thomasino, M. D. Chief Medical Officer acknowledges in a letter dated April 5, 1984, also in this letter Dr. Thomasino stated 'Upon review of this examination and other information in your medical file, it appears that your back condition is now such that it would not preclude your return to duty.' Dr. Thomasino requested that I see Dr. F. Gwinn. I made an appointment with Dr. Gwinn in which his report would have released me to return to work. Dr. Thomasino stated in another letter dated May 2, 1984 that he received a letter from Dr. D. B. Thompson dated April 9, 1984, Dr. Thomasino interpreted this letter as saying that I am psychologically unable to return to work. Please find enclosed a statement from Dr. D. B. Thompson, 1401 6th Ave., Huntington, W. VA. which explains my condition, from a Psychologists viewpoint. I reported to D. F. Gwinn on April 24, 1984, I presented form MD-25 to your office on that same day. I stood for recall at this date."

The statement referred to above from, Dr. D. B. Thompson was dated May 15, 1984. In pertinent part, it concluded that there were no psychological reasons why the Claimant could not return to work.

The Carrier's General Plant Manager, by letter of June 19, 1984, advised the Claimant that his claim had been rejected, mainly asserting as follows:

"On May 2, 1984, you were advised by Carrier's Chief Medical Officer J. A. Thomasino that you were found medically unqualified for employment with the Chesapeake and Ohio Railway Company. Further, we understand that during the proceedings of a jury trial held recently at Catlettsburg, Kentucky, concerning an injury that was alleged to have occurred while you were employed at Raceland Car Shop on June 8, 1981, you and a clinical psychologist who testified on your behalf, presented testimony regarding your permanent disability that would preclude you from seeking railroad work. You are apparently claiming that you are now medically qualified and should be allowed to return to duty based on an opinion from the same psychologist who testified on your behalf at trial.

In view of the testimony presented during the course of above-mentioned court proceeding that you were permanently disabled, it is Carrier's position that you are estopped from asserting a claim that you are not now suffering such permanent disability. In any event, Carrier's Chief Medical Officer has not changed his determination that you are medically unqualified."

On June 29, 1984, the Claimant wrote to the Carrier's General Plant Manager. Among other things, he stated:

"Enclosed you will find a letter dated June 13, 1984, from Dr. Joseph A. Thomasino M.D. to a Dr. D.B. Thompson M.A. In this letter you will find that Dr. Thomasino is asking for additional information on my medical condition. Dr. Thomasino stated that after he received this information he would reconsider my qualifications for work. This letter was dated June 13, 1984, your letter of denial was dated June 19, 1984. The additional information from Dr. Thompson had not even been presented to Dr. Thomasino. Dr. Thompson has since presented a letter dated June 25, 1984 which clarifies my medical condition."

The June 25, 1984 letter from Dr. Thompson cited immediately above mainly stated that the Claimant no longer had any psychological reason preventing him from returning to work.

On August 16, 1984, the Organization's General Chairman appealed the General Plant Manager's denial to the Carrier's Manager of Labor Relations. This appeal focused upon the content of the exchange of letters between the various medical personnel and the Carrier. It did not mention, nor did it address, the Carrier's estoppel assertion.

On October 11, 1984, the Carrier denied the Organization's claim. As relevant herein, the Carrier stated:

"Painter-Helper Michael D. See was absent following June 6, 1981 alleging personal injury. Carrier's Chief Medical Office, Dr. Thomasino, advised See April 5, 1984 that his review of See's medical file reflected no objective evidence of back condition that precluded See's return to duty. During trial of his personal injury suit on April 16 and 17, 1984, See, through his attorney and others, stated that he had suffered a serious, significant, disabling and permanent injury, that the disability and pain could not be corrected except by wearing a low back brace use of TENS Unit, and medication and, further, that See could perform nothing other than, sedentary work. See personally testified under oath that he was in constant pain and, in fact, could no longer even operate a

vacuum sweeper at his home and that he was continually required to wear a low back brace. Further, medical evidence was presented that his back condition was chronic and irreversible. The trial ended in a defendant's verdict. It is apparently your contention that approximately one week later See had no pain or other physical problems that would prevent him from working and you state that See was fully recovered on April 5, 1984.

Initially, it must be noted with respect to the attachments to your letter, that Dr. Thompson is a psychologist not a medical doctor and the letters attached to your appeal do not address See's physical condition. Further, contrary to your statement that See was fully recovered on April 5, 1984, See testified under oath to the contrary on April 16 and 17, 1984. Therefore, it is Carrier's position that See is estopped from asserting a position inconsistent with and mutually contradictory to the statements made under oath personally by See and on his behalf by others during the trial on April 16 and 17, 1984. In view of the above and in the absence of citation of a rule violation or evidence presented that would show a Rule violation, your claim is without justification and is denied."

While the Organization has skillfully and with great vigor pursued the Claimant's cause, both on the property and before this Board, it cannot overcome the contradiction between the position maintained by the Claimant in his civil suit, on the one hand, and the contentions, he has presented to the Carrier, on the other hand. The Claimant attempted to return to work less than one month after a court hearing in which he and his Doctors produced evidence to establish his permanent disability. We therefore, follow a long line of decisions on matters such as this and find that the doctrine of estoppel applies to the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Devine - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1988.