

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13299

Docket No. 13019

98-2-95-2-26

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Kenneth R. Scroggins

PARTIES TO DISPUTE: (

(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway Company)

STATEMENT OF CLAIM:

- “1. Under the current agreement, Carman Kenneth R. Scroggins, ID #622453, was unjustly withheld from service from February 4, 1994.
2. Accordingly, the Carrier restore this employee to service with all seniority rights unimpaired and pay for time lost retroactive to February 4, 1994.”

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 employee 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 chronology of relevant events is as follows. Claimant sustained an on-duty injury on April 29, 1989 while working as a Carman at Carrier's Walbridge, Ohio, Car Shop. Despite extensive rehabilitation efforts, Claimant underwent surgery on

December 20, 1990. He attempted to return to work in September and October 1991, but was unable to continue due to chronic pain in his elbow associated with his injury. Carrier offered Claimant alternative positions, which Claimant declined due to the requirement that he relocate to Florida.

Claimant initiated a lawsuit against Carrier under the Federal Employees Liability Act (FELA) in December 1991 alleging that he sustained permanent disabling injuries for which Carrier was responsible, and seeking over one million dollars in damages. At the trial Claimant's physician testified that he would not likely be able to return to work, and his attorney referred to Claimant's injury as a "career ending injury" and a "permanent and irreversible condition." Carrier's medical expert did not support these conclusions.

On February 11, 1993, the jury rendered a verdict in favor of Carrier, finding that it was not negligent in failing to provide Claimant with a safe work place. As a result, the jury did not have to pass on the nature and extent of Claimant's injury. Claimant appealed this verdict.

On February 4, 1994, Claimant attempted to return to work by seeking to displace a junior Carman, and submitted a medical dated January 12, 1994 concerning his ability to return to work. When he was not permitted to do so, he filed a claim on February 17, 1994. Carrier initially denied the claim based upon the assertion that Claimant was estopped from returning to service due to the inconsistent positions being asserted in his pending litigation. The Organization appealed this denial on April 13, 1994.

On April 24, 1994, the Court of Appeals affirmed the ruling of the lower Court. On June 23, 1994, Claimant's attorney, on his behalf, initiated an appeal to the Ohio Supreme Court again asserting the permanent nature of Claimant's disability. As a result of some exchange of correspondence on the property, the Organization learned that Claimant was pursuing an appeal of his FELA lawsuit while asserting his ability to return to work in this case, and declined to further process the claim. Claimant timely initiated the instant claim before the Board.

Carrier argued throughout the handling of this matter on the property that Claimant is estopped from taking a position that is inconsistent with the evidence adduced in his lawsuit that he is permanently disabled from returning to service as a

Carman with Carrier, and cited numerous Awards in support of such position. Claimant points to the fact that he followed the advice of Carrier's medical expert at the trial and underwent a work hardening program which resulted in his ability to now return to work.

Upon a complete review of the voluminous record, which includes excerpts from transcript testimony, filings and judgments from Claimant's FELA litigation, the Board finds that the doctrine of estoppel argued by Carrier is applicable in this case. Third Division Award 29662 sets forth the threshold test for application of the doctrine:

"For the doctrine of estoppel to be applicable, Claimant must have argued that his injury will forever bar him from railroad employment in this craft. Further, that position must have been taken either by Claimant, himself, or by his attorneys acting in his behalf."

The Board has not only applied the estoppel doctrine to deny claims seeking a return to service where an employee has been successful in a prior FELA lawsuit by either obtaining a monetary judgment or settlement of the claim. see First Division Awards 24565, 24116; Second Division Awards 12969, 12146, 12098, 11641; Third Division Awards 32291, 30818, 29937, 29818, 29780, 29662, 29429, 29408, 28719, 28396, 27302; Fourth Division Award 4535; Public Law Board No. 5515, Award 50, but has also applied the same rationale to cases where, such as here, Defendant was successful in the FELA litigation. See, Second Division Award 11464; Public Law Board No. 5149, Award 2; Public Law Board No. 3897, Award 5; Public Law Board No. 3510, Award 84; Public Law Board No. 2995, Award 62.

The cited decisions appear to be based upon the conclusion that once an employee urges in one forum that his on-duty injury resulted in permanent disability, after receiving a decision in that forum, he may not be permitted to argue a contrary position concerning his physical ability to perform his job in an effort to be returned to work. As noted in Public Law Board No. 2995, Award 62, the fact that Claimant was unsuccessful in his FELA litigation does not affect the principle of estoppel. Neither does the fact that Carrier presented contrary medical opinions to that of Claimant at the trial, as found by Public Law Board No. 3510, Award 84 in a case similar to the one herein.

In adopting the applicability of the principles of estoppel in this case, we further note that Claimant was taking contradictory positions concerning his fitness to return to service concurrently when he attempted to return to work in February 1994 and filed a claim concerning his inability to displace a junior Carman, while appealing the jury verdict to the Supreme Court of Ohio alleging a permanent "career ending" disability in April 1994. Under such circumstances, Carrier was within its rights to disregard the medical proffered to it by Claimant in February, and to reject his attempt to return to service in February 1994.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 6th day of August 1998.