# Award No. 1672
# Docket No. 1564
# 2-SAL-CM-'53

## NATIONAL RAILROAD ADJUSTMENT BOARD
## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

## SEABOARD AIR LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That under the current agreement Carman J. T. Hardee's service rights were unjustly terminated as of November 5, 1951.

(2) That accordingly the Carrier be ordered to reinstate this employe with seniority rights unimpaired and remunerate him for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: Carman J. T. Hardee, hereinafter referred to as the claimant, was regularly employed by the carrier as a car inspector at Wildwood, Florida, and his dating on the carmen's seniority roster maintained by the carrier at the point is December 3, 1948.

The claimant sustained personal injuries in the performance of his regular assigned duties of inspecting cars on January 6, 1950. His regular assignment of hours were from 7:00 A.M. to 3:00 P.M. His regular assigned working days were Friday through Tuesday five days per week including holidays that fell within the five day assignment. His rest days were Wednesday and Thursday.

The claimant's injuries, however, were of such nature that he could not be and was not released for returning to his regular job as a car inspector until November 2, 1951. Thus, the claimant with his doctor's release for duty, were presented to the car foreman by the local chairman for returning to duty on Monday, November 5, 1951, with the result that this officer then, and other carrier officers in succession of appeals, have declined to return this claimant to service.

The agreement effective March 10, 1923, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted there is no dispute between the parties in respect to the claimant having sustained personal injuries in the performance of his regular assigned duties of inspecting cars on January 6, 1950; that the claimant was approved by a competent doctor for returning to his regular job of inspecting cars and that he so reported for such work on November 5, 1951; and that the Carrier would not then, or since,

CONCLUSION

On the facts, the equities of this dispute lie overwhelmingly with the carrier. On the law, the decisions of both the courts and this Board reflect those equities and uphold the carrier's position without exception. The Claimant has been compensated once for what he now seeks again. This Division cannot consistently make itself party to such double recovery. The claim is entirely without merit and should be denied.

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.

The parties to said dispute were given due notice of hearing thereon.

Claimant was regularly employed as a car inspector at Wildwood, Florida. On January 6, 1950, he sustained personal injuries in the course of his employment. Claimant contends that he was physically able to return to service on November 5, 1951, and that the carrier violated Rule 42, current agreement, in refusing to permit him to return to work. Claimant seeks to have his service rights restored and compensation for all time lost since November 5, 1951.

The record shows that claimant brought suit against the carrier in September, 1950 for the damages he sustained because of the personal injuries referred to. The complaint filed stated in part: "By reason of such injuries plaintiff was subjected to great pain and anguish and will continue to so suffer, to-wit, permanently; and plaintiff was disabled from performing his duties for a long time and will continue to be so disabled for a long time, to-wit, permanently; . . . " . The carrier's answer was a general denial. The jury returned a verdict for $25,000 which was paid. The suit was clearly one for permanent disability. It is from the pleadings filed from the parties that we determine the nature of the recovery. The issue of permanent disability was not withdrawn from the jury by the court but was submitted on proper instructions, including instructions setting forth his life expectancy.

It is not a violation of the agreement to bring suit against the carrier to recover damages against the carrier. But when an employe alleges permanent disability resulting from the injury and pursues that claim to a final conclusion and obtains a judgment on that issue, he has legally established his permanent disability and the carrier is under no obligation to return him to service. The rule is aptly stated in Award 6479, First Division, wherein it is said:

> "But when he has not only claimed but has collected damages for the total and permanent loss of his working ability, it is inconsistent to claim that he still has that ability and that the carrier must employ it or pay for it on a seniority basis. Having finally submitted the question to the jury and having collected judgment for the total loss of the ability to perform the services, not even disappointment in the jury's assessment of the damage can justify the claim that the carrier should employ those same services or in default pay for them again."

The awards of this Board and the decisions of courts generally support this reasoning. We shall cite only a few: Awards 1186, 1297, Second Division; Awards 6483, 15543, First Division; Scarano v. Central R. Co. of New Jersey,

107 Fed. Supp. 622; Buberl v. Southern Pacific Co., 94 Fed. Supp. 11; Pendleton v. Southern Pacific Co., 21 L.C. 883 (U.S.D.C. Cal.).

The contention that this claim was one involving discipline has no merit. Award 15,765, First Division; Alcorn v. Missouri-Kansas-Texas R. Co., 88 Fed. Supp. 471. No basis for an affirmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of May, 1953.

DISSENT OF LABOR MEMBERS TO AWARD No. 1672

The majority of the Division in deciding the case adversely to claimant have refrained from passing on the sole issue before it for decision, to wit: whether the language of Rule 42 of the governing agreement required his reinstatement. The governing agreement contains no express exception to the carrier's obligation under Rule 42 to return injured employees to work and we do not understand that this Division in its present decision has implied an exception to Rule 42, conditioned upon recovery in a court of law of a money judgment for the personal injuries sustained.

The right of an employe to recover damages against his employer in a court of law for injuries suffered because of the latter's negligence is quite a different type of right than that of the employe to be reinstated to his job after recuperating from his injuries pursuant to a provision of a collective agreement. Whether under technical legal doctrines an employe who recovers damages against his employer in a personal injury suit is precluded from asserting rights arising under a collective agreement is a question of procedural law which may be resolved only by the courts.

It must be remembered that this Division is not a court of law but rather a specialized administrative tribunal created by Congress "to provide effective and desirable administrative remedies for adjustment of railroad-employe disputes growing out of the **interpretation of existing agreements." Slocum v. Delaware, L. & W. Railroad,** 339 U.S. 239, 94 L. Ed. 795. (Emphasis supplied.) Therefore, whether claimant's assertion of a right to reinstatement to his job (a contractual right) is inconsistent with his prior assertion of a right to recover damages for personal injuries incurred in his work was not an issue for this Division to decide; instead, the issue was: did claimant have a right to reinstatement under Rule 42 when (1) he suffered injury while working at his job and (2) he recuperated sufficiently to be able to return to his position.

If under the circumstances of claimant's injury and subsequent recuperation, he had a contractual right to reinstatement (which he did) this Board should have sustained his claim herein and left the matter of determining whether his maintenance of the prior personal injury suit precluded or estopped him from asserting his contractual reinstatement rights to the United States District Court in the statutory action to enforce an award of the Board pursuant to Section 3 First (p) of the Railway Labor Act.

We think that in deciding this claim on the basis of technical legal grounds which it is not qualified by experience or training to appraise properly instead of on the basis of an interpretation of the language of Rule 42 of the governing agreement the majority of the Second Division erred. We would sustain the claim on the ground that the language of Rule 42 required the claimant's reinstatement to his former position.

Edward W. Wiesner

R. W. Blake

A. C. Bowen

T. E. Losey

George Wright