

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

1. That CSX Transportation, Inc. violated Rules 32 and 34, but not limited thereto, of the controlling Agreement when it refused to allow Machinist H. L. Caldwell to return to work during 1984 after an extended absence due to a job related injury.

2. That, accordingly, CSXT be ordered to reinstate Machinist Caldwell to active service with seniority rights unimpaired and reimburse him for all pay and benefits lost.

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 waived right of appearance at hearing thereon.

On August 6, 1981, while on duty Claimant sustained a lower back injury. In the ensuing FELA litigation an allegation was advanced that the injury resulted in Claimant's permanent disability. While an FELA trial was underway on this matter, a settlement was reached on November 16, 1984, under which Claimant was paid \$54,201.47. Subsequently, Claimant contended that his physical condition improved and he attempted to return to duty. His efforts in this regard did not gain reemployment and on August 6, 1987, the instant Claim was filed contending that Rules 18, 26, 27, 32 and 34 were violated when Claimant was not allowed to return to active employment.

Carrier has defended against the Claim, inter alia, on the basis that Claimant is now estopped from asserting that he is able to resume his job because he previously represented that he was permanently disabled, unable to work as a Machinist and received a monetary settlement on the basis of these representations.

This Board, on a number of occasions, has issued Awards concluding that an injured employee may be estopped from returning to service after successfully maintaining that as a result of an on-duty injury he is permanently disabled from working in his Craft. In this regard see Second Division Awards 11641, 11621, 11464, 11266, 11187, 9921, 8727 and 7976, all of which concluded that:

" ... a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention."

(Third Division Award 6215)

The Claim is without merit and will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1991.