NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25800

THIRD DIVISION Docket Number MW-25884

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to recall furloughed Roadway Machine Mechanic G. R. Hollis on and subsequent to May 9, 1983 (System File MW-83-20-CB/391-92-A).

(2) Roadway Machine Mechanic G. R. Hollis shall be allowed pay at his appropriate rate (straight time or overtime) for an equal number of hours worked by junior Roadway Mechanic J. M. Fowler beginning May 9, 1983 and continuing until Mr. Hollis is recalled to service.

OPINION OF BOARD: The record shows Claimant was originally employed on July 18, 1977, as a Roadway Machine Mechanic. He worked until May 5, 1980, when he suffered severe injuries to his legs. He returned to work on October 20, 1980 on the recommendation of his personal physician. In his letter of October 8, 1980, to the Carrier Claimant's physician placed certain restrictions on Claimant:

> "I am releasing him to return to work which we discussed this date, as a job in the parts department. I don't want him to return to road mechanic until the first of January.
>
> "I feel he has a thirty percent permanent functional impairment to the left lower extremity and a fifty percent permanent functional impairment to the right lower extremity. He may require some surgery in the future, especially to the right knee. For this reason, I feel this patient's medical care should be left open indefinitely."

As recommended, Claimant returned to work in the Parts Department. In May, 1981, he re-entered the hospital for further treatment. He was subsequently recalled to service in November, 1981, and assigned a Roadway Machine Mechanic position headquartered in Stuttgart, Arkansas. On April 23, 1982, he filed an F.E.L.A. suit in the United States District Court against the Carrier to recover damages for personal injuries sustained in the May 5, 1980 accident. In September, 1982, Claimant was furloughed in a general layoff.

On March 22 and 23, 1983, the Trial of Claimant against the Carrier was conducted in Marshall, Texas. The Carrier advises that the jury in the Trial found in favor of the railroad and against the Claimant.

On the basis of his seniority, Claimant stood for recall to service on May 9, 1983, but Carrier states that due to Claimant's testimony in the Trial and the testimony of his personal physician, Claimant was not recalled on May 9, 1983. The Organization is quick to point out that in the Trial a spokesman for the Carrier stated unequivocally that Claimant was an employe of the Carrier; would be called back when his seniority entitled him to recall; that he was a qualified mechanic "and the railroad would be glad to assign him to a job that he requests, that his seniority will support." The Organization also contends that Dr. Walker, Claimant's physician, testified that the Claimant would probably have some degree of permanent disability, but he did not testify that said disability would prevent the Claimant from performing the work of a Roadway Machine Mechanic.

The Carrier is before this Board arguing, in effect, the doctrine of estoppel. This Referee has previously participated in an Award involving the doctrine of estoppel. See Award No. 23830. In that Award we quoted from Jones vs. Central of Georgia Ry. Co. (USDC ND GA, August 13, 1963) 48 LC Par. 18562, where the Court held:

> "It seems to this court the applicable rule of law is firmly established that one who recovers a verdict based on future earnings, the claim to which arises because of permanent injuries, estops himself thereafter from claiming the right to future reemployment, claiming that he is now physically able to return to work."

Many other Court cases were cited in Award No. 23830.

We have generally understood the doctrine of estoppel to be applicable when an employe claims permanent or total disability and receives judgment on that theory. The three Awards cited by the Carrier and briefly quoted from covered such situations. Second Division Award No. 1672 stated in the portion quoted by the Carrier:

> "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."

Third Division Award No. 6215, one of the three quoted from by the Carrier, referred to "a person who has obtained relief from an adversary."

Award No. 10 of Public Law Board No. 1493, from which the Carrier quotes two short sentences, covered a case where the Claimant had acquired a judgment in the sum of $100,000.00 from the Carrier.

We know of no case where the doctrine of estoppel has been applied when the Claimant employe had received no relief through other proceedings.

Limiting our decision strictly to the record that we have, which we are required to do, we find that the Carrier has not proved the doctrine of estoppel to be applicable.

Likewise, we find nothing in the record to indicate a change in Claimant's physical condition between October 8, 1980, and May 9, 1983. Therefore, Claimant should be returned to service, subject to successfully passing the necessary physical examinations required, and shall be paid for all time lost from May 9, 1983, until the date of such physical examinations, from which the Carrier may deduct any earnings Claimant may have had in other employment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of December 1985.