

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39742
Docket No. SG-40190
09-3-NRAB-00003-070419
(07-3-419)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of R. A. Freeze for return to his former position, as requested, with payment for all straight time and overtime lost and with all seniority and benefits unimpaired from April 8, 2006 and continuing until this dispute is resolved, account Carrier violated the current Signalmen's Agreement, particularly Rules 65 and 62, when it refused to allow the Claimant to return to his former position at North Platte, Nebraska, after the Claimant was removed from service due to medical restrictions and he notified Carrier within the requisite 48 hours that he was medically cleared to return to work. Carrier's File No. 1452329. General Chairman's File No. N 62 611. BRS File Case No. 13746-UP.”

FINDINGS:

The Third 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 underlying facts of this case are not in dispute. The Claimant was employed by the Carrier as a Retarder Yard Maintainer headquartered at North Platte, Nebraska. As the result of an on-duty injury sustained in 1999, the Claimant brought a personal injury lawsuit against the Carrier, which proceeded to trial in 2003. The instant dispute developed when the Claimant notified the Carrier, on March 28, 2006, that he had been released to return to duty without medical restrictions, and the Carrier responded that the Claimant would not be allowed to resume his assignment as requested. The Organization argues that the Carrier's action violated Rules 62 and 65 of the parties' Agreement, which address the circumstances under which an employee on a medical leave of absence may return to work.

The Carrier asserts that the Organization is estopped from bringing this claim, because, during the trial in the Claimant's lawsuit, his attorney represented that the Claimant could not return to work for the Carrier. The doctrine of estoppel arises from the principle that a party may not make a pleading contrary to his own prior deeds or actions, and arbitration panels in this industry have held that an employee is estopped from bringing a claim for return to service when it has been asserted in his lawsuit that he suffered a permanent, disabling injury. See Public Law Board No. 4766, Award 27. The application of that principle in this case requires us to determine whether it was established, on the Claimant's behalf, that he could never again perform his duties for the Carrier.

Given that the Claimant has been out of service, the burden is on the Organization, on his behalf, to demonstrate that he is medically qualified to return to work. The Carrier asserts that the Claimant is estopped from making that argument because he represented, through his attorney, that he could never return to work. The Organization has not met its burden of rebutting the Carrier's showing. Therefore, the claim must be denied.

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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 Third Division**

Dated at Chicago, Illinois, this 26th day of June 2009.