Award No. 6740
Docket No. MW-6795

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) That Mason George Baillargeon's rights under the effective agreement were violated when the Carrier refused to allow him to return to his position as Mason;

(2) That the Carrier shall now be required to allow Claimant Baillargeon to return to his position as Mason and allow him payment for all working hours actually lost beginning as of March 20, 1953, and continuing until the violation referred to in part (1) of this claim has been corrected.

EMPLOYE'S STATEMENT OF FACTS: Mr. George Baillargeon entered the Carrier's service as a laborer on July 24, 1935, and was subsequently promoted to a Mason's position on January 9, 1937.

While performing his usual and customary duties as a mason in behalf of the Carrier on June 3, 1948, Mr. Baillargeon suffered a personal injury which caused him severe pain and which necessitated considerable medical treatment, thus precluding his performing his regular masonry duties with the Carrier for a considerable period of time.

The Carrier's subsequent offers of settlement for its liability in connection with the injury sustained by Mr. Baillargeon were unsatisfactory, consequently, appropriate suit was filed against the Carrier to recover appropriate damages for the injury sustained by the Claimant. However, before trial proceedings were completed, the Carrier offered a compromise settlement to the Claimant which was more favorable than any offer previously made on the property, although substantially less than the relief requested through court proceedings. The Carrier's compromise offer of $30,000 was accepted and the suit was withdrawn. The settlement, as accepted by the Claimant included the stipulation that:

"It is clearly understood that future employment is no part of the consideration of this settlement."

Throughout the entire period of the Claimant's absence from the Carrier's active service account of his physical disability, he was considered as having a continuous employment relationship with the Carrier and his name was carried forth on each annual seniority roster computed by the Carrier, which

plaintiff obtained from the defendant a sum of money which by its size, considering plaintiff's age and earning record, indicates that it was intended to recompense him for his loss of ability to earn wages for at least a substantial future period. Now he asks the same court to hear him on a claim that less than a month after this compensatory recovery he was physically rehabilitated and entitled to be restored to duty and pay status by the defendant on peril of a new compensatory recovery for loss of wages from the date of requested reemployment. Not only does the plaintiff found successive claims on inconsistent facts, but he now seeks a duplicating recovery, if we are to respect the legal theory of the earlier claim in settlement of which he received a substantial sum. In these circumstances, we think it was proper for the District Court to refuse to allow plaintiff to litigate a claim in contradiction of his earlier position."

The Courts and the several Divisions of the Adjustment Board have recognized that an injured employe cannot recover a substantial sum of money on the theory that he has suffered total and permanent disability and then claim pay on the theory that his disability was neither total nor permanent. The claim should be denied.

All data and arguments herein contained have been presented to the Employes in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant entered Carrier's service in 1935 and was promoted to a mason in 1937. While working in the latter capacity on June 3, 1948, he suffered an accident resulting in personal injuries. Subsequently, he sued the Carrier on the theory of negligence, alleging that he was permanently and totally disabled and demanding damages in the sum of $100,000.

In due course the case was called for trial before a jury and Claimant produced medical testimony to sustain the allegations of the complaint with respect to the permanent character of his disability. On the fourth day of the trial, October 31, 1951, a compromise was effected whereby Carrier paid Claimant $30,000 and assumed certain of his medical and hospital expenses.

A release was executed by the Claimant which recited, among other things, that the settlement included all demands and claims of any kind whatsoever; that the payment made by the Carrier was apportioned to factors of damage other than loss of time; and that, "It is clearly understood that future employment is no part of the consideration of this settlement."

In February, 1953, Claimant reported to the Carrier's Chief Surgeon for examination, with a view of returning to his former position. The Chief Surgeon advised the Division Engineer that he had examined the Claimant and had read the history of his case, upon which he placed considerable emphasis, and stated his conclusion to be that Claimant should not return to work for the Carrier as a mason.

Subsequently, Claimant submitted to the Carrier letters from four other doctors, each of whom stated that Claimant was able to return to work. It further appears that since he received his injuries the Claimant's name has been carried on the Company's seniority roster.

The Organization contends that the Carrier violated the effective Agreement when it refused to allow the Claimant to return to work and the demand is that he be compensated for all time lost since March 20, 1953, and continuing until the violation is corrected.

There are rules in effect which provide, in substance, that upon return of an employe from an authorized leave he shall have a right to the position he held when he went on such leave, and that an employe's absence on account of sickness or other disability does not require the protection of formal leave.

The principle seems to be well established by the awards of this and other Divisions of the National Railroad Adjustment Board, as well as by court decisions, that while it is no violation of the agreement for an employe to sue the carrier to recover damages for personal injuries, where such suits are permissible, nevertheless, when, in such a suit, the employe alleges permanent disability and recovers a judgment on the theory, the carrier is under no obligation to return him to service. This principle is predicated upon the theory of estoppel, which precludes a party from taking a position inconsistent with that previously asserted, when the matter in issue has been finally adjudicated. See our Award 6215, Second Division Award 1672, and First Division Awards 6479, 6483 and 15543; also 19 American Jurisprudence (Estoppel, section 50), 31 Corpus Juris Secumdum (Estoppel, section 108), and numerous cases there cited.

The principle above stated has been applied with like force to situations where an employe has sued for total disability and subsequently settles his case by compromise for a substantial consideration, executing a release thereof broad enough to cover all claims and demands. In such cases it has been held that the release includes loss of seniority rights. See First Division Awards 4930, 5195, 5216, 8266, 8267, and 14770.

The Organization seeks, however, to find a basis for distinguishing the instant case from the application of the principles above stated, on account of special facts and circumstances disclosed by the record before us, to-wit: (1) that the settlement was the result of compromise, rather than by judgment; (2) that the Chief Surgeon's conclusion was equivocal and was overcome by the positive findings of Claimant's doctors to the effect that he was able to return to work; (3) that Claimant's name was carried on the seniority roster subsequent to his initial disability; and (4) that the provision of the release—"It is clearly understood that future employment is no part of the consideration of this settlement"—conclusively establishes that said settlement was not intended to bar Claimant from returning to his position if and when his disability should cease to exist.

What we have already said disposes of the Organization's first, second, and third propositions. Estoppel may as well result from a compromise as from a judgment; the fact that Claimant has recovered from his disability is immaterial since, in any event, the case was settled on the assumption that his disability was total and permanent; since, as was noted in First Division Awards 4930, 5195, 5216, and 8266, a release of all claims and demands in a settlement of this character is broad enough to constitute a discharge of seniority rights; and the fact that Claimant's name was not removed from the seniority roster is immaterial.

The Organization urges that since the release signed by the Claimant recited that "future employment is no part of the consideration of this settlement," it was the evident intent of the parties to leave the question of future employment open for future determination. We do not so construe it. As a matter of common knowledge, it was frequently the policy of carriers in times past to obligate themselves to provide future employment as a part of the consideration for the settlement of personal injury claims. The clause here under consideration is a part of a printed form of release, evidently provided by the Carrier, and we think its purpose was to make certain that the Carrier was not obligating itself to furnish future employment to the Claimant. To sustain the construction of the part of the release relied on by the Claimant would make it conflict with the preceding part, which recites that the settlement "includes all claims or demands of any kind whatsoever."

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1954.