

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29045
Docket No. MW-28901
91-3-89-3-307

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

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

(1) The Agreement was violated when the Carrier failed and refused to permit Mr. M. Andrews to return to service in accordance with his seniority beginning March 31, 1988 (Carrier's File 880308 MPR).

(2) As a consequence of the aforesaid violation, Mr. M. Andrews shall be allowed:

'...eight (8) hours per day at the straight time rate of pay, and any overtime and Holiday pay, and any additional expense incurred that would normally be covered by benefits paid by the Carrier. This claim is to begin MARCH 31, 1988, and continue until the Claimant is allowed to place himself in line with his Seniority.'

FINDINGS:

The Third 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 were given due notice of hearing thereon.

This dispute concerns the Carrier's determination that the Claimant was physically disqualified from returning to duty after an extended absence. Following a series of on-duty injuries to his knee, the latest being in 1985, the Claimant last performed service in 1986. He instituted a suit under the Federal Employers Liability Act and on February 27, 1987, was awarded a settlement of \$200,000 for "personal injuries . . . permanent in nature."

Part of the support for the Claimant's FELA suit was a September 16, 1986 statement from his treating physician, which read in part as follows:

"The above captioned patient has had recurrent daily pain and swelling on trying to resume his previous employment. At this point in time, following his arthroscopic surgery I feel that he has reached his point of maximum improvement and that further strengthening exercises are only begging the issue. I would recommend that he go back to a less demanding type of employment for his knee than that of a track foreman and would rate his permanent impairment as 20% of the man."

In March and April 1988, the Claimant attempted to return to duty. He presented two letters from physicians other than the one who had previously treated him. Both letters suggested that the Claimant could return to his previous duties. One, however, recommended "the use of a Lennox Hill brace as a prophylactic device." The other letter stated:

"I instructed the patient that if he should have, or develop any feelings of instability, that consideration of a brace would be made."

The matter of the Claimant's return to duty was reviewed by the Carrier's Medical Department, and the Assistant Medical Director wrote as follows on May 11, 1988:

"Regarding Mr. Michael Andrew's request to return to the duties of a trackman, I have reviewed the previous medical reports as well as the most recent medical examinations by Dr. Scott Beall.

In a previous medical report of September 15, 1985, Dr. Dennis Dusek suggested that Mr. Andrews had reached the point of maximum recovery and had degenerative changes in his knee. He stated that he did not feel that he should return to physically demanding work and recommended a permanent impairment. In that degenerative changes do not improve with time and there is no evidence that there have been any subsequent procedures performed, I feel that this medical report still stands. I also read Mr. Andrews' sworn testimony in which he states that the activities of a trackman aggravated the symptoms in his knee. There are several letters from Mr. Andrews and from Dr. Dusek which say that the degenerative changes are aggravated by his normal activity.

The most recent medical report from Dr. Beall suggests that at this time there is some disability in the knee joint because of a positive anterior drawertest. His examination also reveals that there is no acute inflammation in the knee. Based on this report, I have no doubt that Mr. Andrews' knee is not causing him any immediate problems, and if he continues in a normal activity level there would be only a minimal risk of aggravating that knee. With his past history and the demonstration that the activities of a trackman aggravate his knee and the continuing findings of instability, I feel that if Mr. Andrews returned to work his knee would develop symptoms of his condition and further damage to the knee joint.

Despite a normal exam now, I do not feel that Mr. Andrews' knee is adequate to perform the duties of a trackman."

The Claimant thereupon was refused the right to return to work, and the Claim herein follow.

The Board concludes that the Carrier properly relied on the judgment of its Medical Department that the Claimant was not physically qualified to return to work. As noted above, this was based on the Claimant's medical history and the limited approval provided by physicians who recently examined him. The Board has no basis to question this medical judgment or to find that it was made in an arbitrary or discriminatory manner.

The Board further notes that the Claimant failed to utilize the services of a Medical Review Board, available to him in instances where an employee believes he is improperly disqualified. Thus, the Board is confined to the evidence of record, as noted above.

With this conclusion, the Board need not review the Carrier's argument as to possible estoppel of the Claim based on the terms of the FELA settlement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Over - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1991.