

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35017
Docket No. MW-35117
00-3-98-3-875**

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak -
(Northeast Corridor)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. A. Alessi to return to service following his medical release for service beginning February 5, 1998 and continuing (System File NEC-BMWE-SD-3858 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated for all wage loss suffered beginning February 5, 1998 and continuing until he is reinstated to service.”**

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.

On December 15, 1995, the Claimant, who was regularly assigned and working as a Track Foreman, sustained an on-duty personal injury. Thereafter he filed a claim under the Federal Employers Liability Act (FELA) which was resolved by a jury award for past lost wages and past pain and suffering, but with no award for the loss of future wages. Three days after the jury award was issued, the Claimant presented a note from his physician indicating that he was eligible for a return-to-work physical. The Carrier refused to permit him to undergo a physical, contending that in the course of the trial, he claimed that he was permanently disabled and not able to perform any job duties.

The Rules applicable to the case are Rule 22 and Rule 62. Rule 22 provides in part "an employee returning to duty after leave of absence, vacation, sickness, disability or suspension, shall within five days, after reporting as ready for duty, return to his former position, exercise seniority to any position advertised during his absence, or may displace any junior employee promoted to a position under this agreement during his absence, subject to Rule 2 (a). . . ." Rule 62 deals with the requirement by AMTRAK that employees returning from absence caused by disability, undergo a physical examination.

The Carrier relies upon the doctrine of judicial estoppel in support of its position that the Claimant may not be returned to work. It contends that throughout the trial, the Claimant and his witnesses made clear that he was permanently disabled. The Organization to the contrary, points out that the record is clear that while the Claimant could not perform the duties of his former position, he stated that there were other jobs which he possibly could have performed.

Rule 22 is substantive, while Rule 62 is procedural. Rule 22 sets forth that an employee has specified rights upon reporting as ready for duty. In this case the doctor's statement was that the Claimant was released to undergo a return-to-work physical. The Carrier's defense is that it had the right to deny the Claimant the right to return to work based upon the doctrine of judicial estoppel.

An analysis of the portions of the transcript provided by the parties reveals agreement by all witnesses that the Claimant could not return to his prior job as a Track Foreman. The testimony in the record also indicates, however, that the Claimant could perform some jobs, be they characterized as 'sedentary' or 'light duty.' There is nothing in the record to indicate the Claimant raised a contention that he

could not perform any duties, leaving open the possibility that positions referred to in Rule 22 could be performed. The Board considered the numerous cases submitted by the Carrier in support of its position and finds that they do not apply to the present situation. This decision should in no way be interpreted as overturning the Rule of law set forth therein. Judicial estoppel is a concept which is quite conclusive, requiring a clearly defined position taken by a party in a proceeding. In this case the Claimant left the door open for the possibility of performing certain job functions. Based upon the foregoing it is found that the Claimant had the right to undergo a return-to-work physical.

A determination that the Claimant has the right to undergo the physical does not mean a finding that he has the right to a job. His own physician did not state that he was available for work, but rather that he was being referred for a return to work physical. Clearly the Claimant's present physical condition, some two and half years later, is not the issue to be resolved in this proceeding. Rather, a determination must be made regarding whether the Claimant would have been eligible to claim any job as provided in Rule 22.

It is the determination of the Board that the Claimant's medical records relating to his work injury, which were in existence as of January 19, 1998, be provided to two physicians, one selected by the Claimant and the other by the Carrier. Such physicians will also be furnished job descriptions and duties for positions which would have been available to the Claimant as of February 5, 1998. Such job descriptions and duties shall be jointly furnished by the Organization and the Carrier.

If the physicians are in agreement that the Claimant could not perform any work within the job descriptions provided, the claim for reinstatement is denied. If the physicians agree upon jobs which the Claimant could have performed, he shall be eligible to select a job and shall be entitled to backpay from February 5, 1998 to the date he is returned to work, subject to a deduction for any outside earnings, and further, subject to a deduction for any periods of time in which he was unavailable for work.

In the event the physicians selected by the parties are unable to agree upon either of the contingencies set forth, they shall jointly select a third physician, whose decision shall be final.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of October, 2000.