

Case No. 17

PARTIES)
TO)
DISPUTE)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
AND
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Accordingly, Claimant Jones should be returned to the Carrier's service and compensated for wage loss suffered.

The record shows that in this dispute former Southern Division Trackman V.G. Jones (the "Claimant") sustained an on-duty back injury on April 5, 1983. The Claimant received medical treatment for his injury which was diagnosed as a "chronic myoligamentous strain and probable protrusion of a disc in the low back." As a result of his injury, the Claimant alleged that his injury resulted in a permanent disability and that he could not perform the duties of a trackman. He then filed a lawsuit against the Carrier in the U.S. District Court for the Eastern District of Texas to recover damages for his alleged permanent disability.

The Claimant's lawsuit against the Carrier eventually went to trial. The Claimant and Dr. Robert Koenig testified at the civil trial that as a result of his alleged back condition the Claimant would never be able to work again as a trackman. At the conclusion of the trial a verdict was rendered against the Carrier on January 16, 1987 and the Claimant was awarded damages.

The record shows that on March 12, 1987, the Claimant presented to the Carrier's Division Office at Temple, Texas, a medical release from the Brady Doctors Clinic which authorized the Claimant to "return to full duty without restrictions." The Carrier did not accept the release and refused to permit him to return to service. It was the Carrier's position that based on the Claimant's and his attending physician's testimony during his


personal injury trial that the Claimant would never be able to perform the duties of the trackman position and the judgment against the Carrier, the Claimant was now estopped from asserting that he was physically able to work and should be entitled to return to Carrier's service.

The Organization argued before this Board that the Carrier made no attempt to determine if the Claimant was physically able to hold a position of trackman. Moreover, the Carrier disciplined the Claimant by his loss of seniority without notice to the Claimant or the Organization. Thus, the Carrier violated the terms of the collective bargaining agreement.

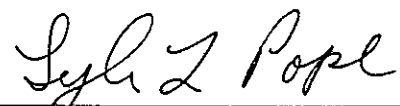
The Board has read and considered all the evidence of record. Based on the record the Board has determined that the dispute between the parties is not a disciplinary case. Accordingly, the Board finds that the time limits as set forth in the collective bargaining agreement were complied with by the parties.

The Board further finds that under the principle of estoppel, the Carrier properly refused to allow the Claimant to return to work. Numerous Board awards and court decisions have held that when an employee alleges permanent disability and seeks monetary relief from the carrier through the judicial process, the employee is not entitled to return to carrier's service on the basis that he is not permanently disabled after he has obtained monetary relief against the carrier. As stated by Referee Preston Moore in Public Law Board No. 1493, Award No. 10, "In effect, the doctrine of estoppel says 'you can't have it both ways. You either are or you are not (permanently disabled).'" See also Award No. 7 of this Board; Public Law Board No. 2774, Award No. 136; and Public Law Board No. 3824, Award No. 4.

AWARD: Claim denied.


Alan J. Fisher, Chairman
and Neutral Member


Clarence F. Foose
Organization Member


Kyle L. Pope
Carrier Member

Dated: August 10, 1988, Chicago, Illinois