

PUBLIC LAW BOARD NO. 2774

PARTIES Brotherhood of Maintenance of Way Employees
TO
DISPUTE: and

The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

1. That the Carrier violated Rule 26(b) by refusing to allow Arizona Division Track Foreman, Tom Garcia, to return to the service of the Carrier after being released by his attending physician.
2. That the Carrier shall now be required to have Claimant re-examined in accordance with Rule 26(b) and paid for all wage loss suffered beginning January 10, 1989, and continuing until Claimant is afforded his rights under said Rule.

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The record indicates that Claimant had injured his back while working as a Trackman in July of 1983, and subsequently re-injured it in July of 1985 while working as a Foreman. When he had been assigned to the Foreman's position, it was assigned on the basis that he would do no heavy lifting work. In August of 1985, Claimant was returned to service in a light-duty capacity. Beginning on August 24, 1987, Mr. Garcia was placed on medical leave of absence due to his

back and had surgery performed on his spine subsequently. He has not worked since that time. On December 13, 1988, he underwent a re-entry physical examination by his physician who released him to duty without restrictions. A review of that re-entry diagnosis by his doctor, through Carrier's medical director, indicated that he could not do any heavy lifting, and since there were no positions to accommodate this restriction, he was not permitted to return to work.

The thrust of the organization's position here is that Claimant be re-examined in accordance with Rule 26(b) to determine whether indeed he can return to work. This was based on the fact that the organization and Mr. Garcia did not believe that his condition justified the restriction of service as indicated by the Carrier's medical department, and sought the opinion of a third neutral physician to make that determination. Carrier refused to allow that re-examination indicating that there was no dispute between the two physicians, and therefore there was no basis for a re-examination. Carrier also took the position, that under the principle of estoppel, there was no basis for re-examination either. Carrier noted that in the FELA claim made by Mr. Garcia against the Carrier, he was awarded \$260,000.00 due to the injury.

An examination of the deposition given by Claimant's own neurosurgeon, indicates that he found that Claimant was permanently disabled and could not perform heavy work or heavy labor requiring lifting, bending or stooping due to his back vulnerability. Furthermore, the physician, Dr. Maron, indicated that the disability and problem of injury was permanent.

It is quite clear that the award, which Claimant received in Federal Court for his suit under the FELA for \$260,000.00, involved future earnings. Boards such as this have ruled for many years that an employee cannot take the position that he

is first injured permanently and receives a cash award and then comes back and seeks reinstatement based on the fact that he is able to perform in his position. Such an inconsistency would be contrary to public policy and to law. It is clear under Federal decisions that one who receives a verdict based on future earnings arising from permanent injury is estopped from claiming the right to future re-employment (Public Law Board No. 2774, Award No. 136, as well as Public Law Board No. 3824, Award No. 4). In this case, as in many other Awards, the principle of estoppel must apply and Claimant cannot successfully request reinstatement based on his prior claim of permanent injury. Thus, the Claim must be denied.

AWARD

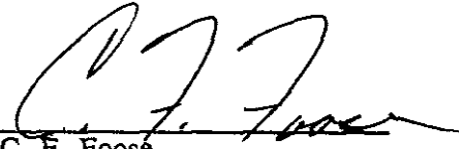
Claim denied.



I. M. Lieberman, Neutral-Chairman



L. L. Pope
Carrier Member



C. F. Foote
Employee Member

Chicago, Illinois
June 26, 1991