

PUBLIC LAW BOARD NUMBER 3530

Award Number: 25

Case Number: 25

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Electric Welder Helper, W.D. Terry, 2129 Orange Avenue, N.W. Roanoke, Virginia 24017, was denied the right to return to work after being off on disability. Employees request that Mr. Terry be paid at the Electric Welder Helper's rate of pay starting on January 26, 1983.

FINDINGS:

On July 12, 1977, Claimant removed himself from his position of Electrical Welder Helper due to pain in his right hand. In 1978, while still out of service, Claimant brought suit against Carrier, alleging that Carrier was liable for the injury to Claimant's hand. The case was heard before a jury, which returned a verdict in favor of Carrier. That verdict was upheld on appeal. On January 17,

1983, Claimant was examined by his personal physician who released Claimant to return to work in his former position. Carrier refused to allow Claimant to return to work, on the ground that Claimant had earlier taken the position that he was permanently disabled.

The Organization filed a claim protesting Carrier's decision and requesting that Claimant be returned to service with pay for time lost since January 26, 1983. The claim was denied at all levels of appeal on the property, and the Organization then submitted the matter to this Board for resolution.

The issue to be decided in this dispute is whether Carrier improperly denied Claimant the opportunity to return to service; and if so, what should the remedy be.

Carrier contends that its refusal to allow Claimant to return to work was proper, in that at the time he brought suit Claimant alleged that his injury was of a permanent nature. According to Carrier, Claimant is therefore estopped from asserting that he is now capable of returning to his former position.

The Complaint which Claimant filed against Carrier states that Claimant had "suffered a permanent impairment of his earning capacity," and that his "injuries and consequences therefrom are permanent." There is no evidence that

Claimant ever alleged permanent disability, or claimed to be forever unable to resume his duties as an Electric Welder Helper. Carrier's reliance on the doctrine of estoppel is therefore misplaced, inasmuch as it is based upon the belief that Claimant alleged a permanent unfitness for service. In addition, the doctrine of estoppel in this context has historically been applied only where the claimant received some payment for alleged permanent injuries in the form of either a settlement or a court award. In the instant case, Claimant's attempts to obtain compensation for his injury were unsuccessful.

For the reasons stated above, it is the opinion of this Board that Claimant has not been estopped from seeking to return to his former position with Carrier. Claimant's fitness for service shall therefore be determined in accordance with the Award herein.

#### AWARD

Carrier shall have Claimant examined by a Carrier physician immediately. If the Carrier physician agrees with Claimant's physician's determination that Claimant was physically fit for service as of January 26, 1983, Carrier shall then restore Claimant to service with compensation for all time lost since that date, less any outside income Claimant may earn during that period. In the event that Carrier's physician does not agree with the determination of Claimant's physician, the two physicians shall select a third neutral physician who shall

determine whether Claimant was fit for service as of January 26, 1983. Should the neutral physician determine that Claimant was in fact fit for service on that date, Carrier shall immediately restore Claimant to service with compensation as specified above. If the neutral physician should determine that Claimant was not fit for service on that date, Claimant shall not be restored to service, and shall not be compensated for time lost.

Nicholas Kumar  
Neutral Member

J. P. Alletto, Jr.  
Carrier Member

Bruce L. Hall  
Organization Member

DATE: 1-28-85