

Award No. 7
Case No. 8

PUBLIC LAW BOARD NO. 4244

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: The Agreement was violated when Trackman R. J. Flores was improperly withheld from service beginning April 1, 1985 and when the Carrier refused to allow the claimant to submit to reexamination as provided for by Rule 26 (c).

The claimant shall be returned to the Carrier's service and he shall be compensated for all wage loss suffered.

FINDINGS: This Public Law Board No. 4244 (the "Board") finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, this Board has jurisdiction over the parties and the subject matter involved, and that the parties to this dispute were given due notice of the hearing thereon.

The records show that on April 25, 1984, former New Mexico Division Trackman R. J. Flores (the "Claimant") sustained an alleged back injury while on duty for which he sought medical treatment. On April 26, 1984, he went on a leave of absence due to the alleged injury. The Claimant returned to work on May 29, 1984, but was restricted to light duty. From June 5, through September 17, 1984, the Claimant again went on a leave of absence and was hospitalized due to back problems. On September 18, 1984, the Claimant returned to work but was restricted from lifting over 10 pounds. The Claimant last worked on November 6, 1984, and then went on a third leave of absence due to "gouty arthritis."

On February 7, 1985, the Claimant's personal physician, Dr. Leslie Shauf, released him for duty on the basis that his gout had improved. However, the Carrier's medical director questioned the Claimant's medical status concerning his previous back injury. On March 7, Dr. Shauf responded that the Claimant should not return to the heavy duties of a trackman on account of his previous back injury.

On April 2, 1985, the Claimant presented a note to the Carrier dated April 1, from Dr. Shauf stating that the Claimant could perform all the duties of a trackman. The

Carrier then requested additional medical information concerning the Claimant's recovery from his back problem. On April 12, Dr. Shauf indicated by letter that his note was based on the Claimant's personal belief that he could perform the duties of a trackman.

During this period of time since the date of the alleged back injury of April 25, 1984, the Claimant had filed a lawsuit against the Carrier on account of his injury. As part of the lawsuit, Dr. Paul Turner, a neurosurgeon, and Dr. Shauf both testified that the Claimant had suffered a permanent back injury. Dr. Turner diagnosed that the Claimant had sustained an annular tear and severe sprain of the back which limited the claimant's ability to do heavy manual labor. Dr. Turner stated that the Claimant had a permanent partial disability of the back and that he had a permanent weakness of the structure of the back. Dr. Shauf diagnosed that the Claimant had suffered a permanent injury and weakness to the back which would make him susceptible to further injury and limit his ability to accomplish heavy manual labor.

On April 22, 1985, the Claimant agreed to settle his lawsuit against the Carrier and entered into a formal release with the Carrier in consideration for a \$85,000.00 settlement. The release stated in pertinent part:

The undersigned (the Claimant) and the (Carrier) desire to conclude all causes of action of the undersigned for all injuries, disabilities, loss of wages, loss of earning capacity, physical pain, mental anguish, medical expenses and damages of any nature which he has sustained in the past or which he may sustain in the future....

The undersigned expressly represents that he is making this settlement of his own free will and accord...and the undersigned fully understands and realizes that the injuries sustained by him have resulted in a permanent partial disability and, said injury may become progressively worse in the future.

The undersigned further makes it known that it is understood and agreed that this settlement includes the payment of such medical expenses, loss of wages and loss of earning capacity which are attributable to any injury and its resulting effects arising out of the accident of April 25, 1984, in the past and in the future.

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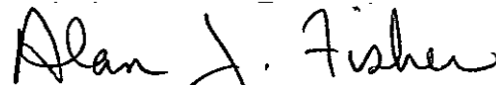
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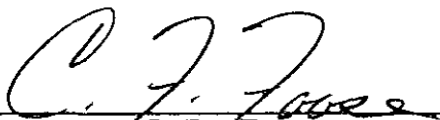
It is the Carrier's position that the monetary settlement to the lawsuit compensated the Claimant for his permanent partial disability and resulting inability to perform trackman duties. The signed release and the Claimant's acceptance of the monetary settlement in effect constituted his resignation. The Organization contended that the release and monetary settlement did not involve the issue of future earnings. The Organization argued that the Claimant settled for a lower monetary amount in order that he could return to work.

After careful study of the record, the Board finds no merit or evidence to support the Organization's position. Further, evidenced by the correspondence exchanged between the parties, both parties agreed that Rule 26 (c) is not applicable in this case. The Board concludes that a claimant who claims a permanent disability and is awarded a monetary settlement in one proceeding, he is then estopped from seeking a return to service in a different proceeding on the basis that he is not permanently disabled. The Board's conclusion is consistent with numerous Board Awards from all divisions of the National Railroad Adjustment Board, Special Boards of Adjustment and Public Law Boards.

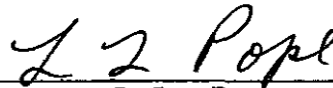
AWARD: Claim denied.



Alan J. Fisher, Chairman
and Neutral Member



C.F. Foosse
Union Member



L.L. Pope
Carrier Member

Dated: September 8, 1987
Chicago, Illinois