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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32291
Docket No. MW-33002
97-3-96-3-395**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly withheld Mr. M. A. Chunko from service, beginning November 18, 1994 and continuing (Carrier's File 8365-1-506 DTI).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated with seniority, vacation and all other rights unimpaired and he shall be compensated for all wage loss suffered beginning November 18, 1994 and continuing.”**

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 October 26, 1992, Claimant, then a 29-year-old Bridge Man Helper/Truck Driver with the Carrier, sustained an on-the-job injury to his lower back while moving lockers at Flat Rock, Michigan. Some six months later, he brought an action against Carrier under the Federal Employers Liability Act (FELA) in which he sought damages of \$974,000 for current and future wage losses and other causes. On June 28, 1994, Claimant and Carrier concluded a settlement of that action pursuant to which Claimant released all claims against the Carrier in consideration for a payment of \$110,000.

In November 1994, Carrier rejected Claimant's request to return to service on grounds that he had relinquished all employment rights as a result of asserting and settling a claim of permanent disability. On January 11, 1995, the Organization filed this claim on behalf of Claimant.

The Organization's claim is based chiefly upon two arguments. First, the Agreement provides specific Rules governing loss of seniority and its exercise to return to work after a medical disability. It does not require a forfeiture of seniority for the exercise of an employee's legal rights under the FELA. At no time during the prosecution or settlement of that action did Claimant either expressly resign from Carrier's service or impliedly waive his seniority rights. Second, the settlement Claimant received is patently insufficient to compensate him for prospective lost earnings.

The Carrier's defense is predicated primarily on the familiar doctrine of equitable estoppel which, it argues, should operate to bar this claim because it acted in detrimental reliance upon the Claimant's representations of permanent disability in settling his FELA claim. Carrier contends that a significant volume of industry arbitral precedent arising out of analogous fact patterns supports its position.

A careful review of the extensive record in this case, including the comprehensive Submissions of both parties, suggests that application of the doctrine of equitable estoppel is appropriate here and consistent with numerous previous Awards of this Board where claimants sought reinstatement after obtaining an FELA judgment or settlement based upon claims of permanent disability. Third Division Award 28217 offers a succinct statement of the principle:

"The basic philosophy underlying these holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions

with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention."

Third Division Award 29662 sets forth the threshold test for application of the doctrine:

"For the doctrine of estoppel to be applicable, Claimant must have argued that his injury will forever bar him from railroad employment in this craft. Further, that position must have been taken either by Claimant, himself, or by his attorneys acting in his behalf."

Claimant asserted in his FELA complaint at paragraphs 15 (E) and (F) claims for both past and future lost earnings. His argument throughout that litigation distinctly pointed at the unfortunate early termination of his railroad job. He testified in his deposition that he had discontinued therapy because the therapist "thought he had done all he could do" and "I had to live with whatever I had, the pain that I had there...." In reply to a question inquiring whether he had any written reports indicating that he could "never be able to return to work as a bridge man," he represented that his therapist "said or thought I probably wouldn't be able to...." Asked under oath if he knew of any job available in his craft which would allow him to work, he testified there was "no other job for me. They haven't let anybody work light duty, so everything is either you can lift railroad ties and do the work or there really isn't nothing there." Among other representations provided to the Court in the litigation-related mediation summary were the following:

"Plaintiff has continued treating with Dr. Newman since that time, having a CT scan performed 5/25/93 at Oakwood Hospital which demonstrated L4-5 disc bulging posteriorly. He has disabled him from the heavy 'bridgeman' work he did at Grand Trunk, and Grand Trunk has no light duty work for him...Dr. Ancell has indicated that Plaintiff's current and future earning capacity is in the \$10,000 / year range due to his medical restrictions. With his prior earning capacity at Grand Trunk being \$13+

/ hr, he has a yearly wage loss of \$16,000. Over his 34 remaining work years, his wage loss will exceed \$544,000.”

The Vocational Rehabilitation Evaluation prepared by a rehabilitation consultant in connection with Claimant's FELA litigation indicated that Claimant had sought no second medical opinion beyond that of Dr. Newman, made no attempt to look for other employment, had not re-activated his real estate license, had not looked into any rehabilitation program, was seeing his doctor once every four weeks, taking a pain pill “once or twice a week,” was not undergoing therapy, and, “with 0 being no pain and 10 being the worse [sic] pain he has ever had, no matter what it is due to...[he] rated [his pain] at a 3 level.” That report further stated:

“From a vocational rehabilitation standpoint, Mr. Chunko has sustained significant vocationally limiting problems. His past relevant work has been both in the railroad industry, with a earning capacity of \$13. 00 per hour, and to a much lesser extent, the real estate field. Given the restrictions imposed by Dr. Newman, he would not be able to perform his past relevant work at the railroad....”

Thus, embedded in what ultimately proved to be his successful demand for significant damages attributable to Carrier's alleged negligence was a prominent plea of permanent disability. Given Claimant's minimal loss of past earnings and his low-level pain, only the most naive observer would deny that the central thrust of Claimant's personal injury action rested on such a claim, because only by so anchoring his contentions could future lost earnings be taken into account. Having induced the Carrier to rely upon the fact of his physical impairment and bend in his direction, Claimant, in the absence of countervailing factors, should not now be permitted to disavow the basis for a settlement that disposed of his claim with an award of nearly seven years of pay.

The Board concludes that the Carrier properly invoked the principle of equitable estoppel to bar Claimant's assertion that he is now fit to return to service. Our conclusion is entirely consistent with a sizable body of Awards and case law in which equitable estoppel has been the basis for denial of similar requests for reinstatement. See, e.g., First Division Award 6479; Second Division Awards 9921, 11464, 11641, 12098, 12146, 12969; Third Division Awards 23830, 24116, 28217, 28719, 29408, 29662, 29780, 29818, 29937, 30818; Public Law Board No. 1660, Award 21; Public Law Board

No. 3001, Award 2. See also Minneapolis RR v Rock, 410 U.S. 413; Scarano v. Central Railroad of New Jersey, 203 F. 2d. 510.

The suitability of this result here is bolstered by two further considerations. First, although application of equitable estoppel does not demand that the employee in fact be physically able to perform the work of his craft, its fairness in context is apparent when the Board notes that, contrary to the argument of the Organization, Claimant's request to return was unsupported by either medical evidence or opinion of any kind from any physician. Nor on this record is there any suggestion of successful post-settlement surgery, therapy or other explanation for full recovery within five months of settlement. Secondly, the release signed by Claimant and his attorney disposing of his lawsuit, while containing no explicit waiver of seniority, is very broad, reading in pertinent part:

"I, Michael Chunko...does [sic] hereby release and forever discharge GRAND TRUNK WESTERN RAILROAD COMPANY, its servants and agents, from all manner of actions, claims, demands and causes of action of every kind or nature whatsoever now existing, and any which may hereafter develop or be discovered, which in any manner arise out of or by reason of the occurrence(s) of October 26, 1992, the same being the subject matter of [FELA litigation]. I understand that this is a full and final settlement of all my claims, and NOT JUST FOR MY WAGES...and that any payment made to me is done only as a compromise to avoid litigation and to forever terminate all such controversy relating thereto."

The Board finds that Claimant obtained relief from the Carrier by asserting proof of permanent disability, that front pay was at least some part of the consideration therefor, and that Claimant released "all manner of actions, claims, demands and causes of action of every kind or nature whatsoever...which in any manner arise out of or by reason of the [injury]...." Accordingly, we do not accept the Organization's principal argument that Claimant never waived his seniority and conclude that his claim should be barred both by equitable estoppel and by the terms of the above release as arising out of Claimant's on-the-job injury.

Lastly, the Organization invites this Board to reinstate Claimant because his monetary settlement was inadequate. That settlement was grounded upon a supposition of permanent disability. It is not the charge of this Board to speculate about its sufficiency for Claimant's future needs any more than for us to hypothesize about how

much lower it may have been had Carrier been made aware of the possibility that Claimant would seek reinstatement upon receiving his settlement check. The parties to that settlement found it adequate, and they deserve to have it enforced.

Based upon a careful review of the extensive record here, including the thoroughly researched Submissions and the comprehensive arguments of both parties, the Board finds that the claim in this case must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of November 1997.