Award No. 1805
Docket No. 1683
2-SP(PL)-MA-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES: (1) That under the current agreement Machinist John E. Opich's seniority rights were unjustly terminated as of March 23, 1953.

(2) That accordingly the Carrier be ordered to reinstate this employe with seniority rights unimpaired and paid for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: John E. Opich, hereinafter referred to as the claimant, was employed by the carrier as a machinist at its Roseville, California shops on March 9, 1937. The claimant remained in the service and sustained personal injuries in the performance of his regular assigned duties on January 10, 1951. His regular assignment of hours were from 8:00 A.M. to 4:30 P.M. Monday through Friday, with rest days of Saturday and Sunday.

The claimant's injuries were of such nature that he did not recuperate sufficiently to be able to return to his position until March 23, 1953. The carrier refused to allow the claimant to return to the service of the carrier on March 23, 1953 claiming he (claimant) voluntarily and finally relinquished and resigned his employe relationship and seniority; further, his name was removed from the seniority roster and his record as an employe closed.

The carrier made no attempt to have the claimant's condition ascertained as to whether or not he was able to return to his position on March 23, 1953 or since, while the employes in the handling of the case presented a statement dated June 15, 1953, signed by Max Dunievitz, M.D. to the effect the claimant's physical condition was excellent and that he could perform any ordinary work, a copy of which is submitted herewith and identified as Exhibit A.

The agreement effective April 16, 1942, as subsequently amended, is controlling.

the carrier's contention found support in Award 5862 of the First Division, the Division quoted certain portions of the said award and went on to state:

> "The principle announced in the foregoing quotation was applied by the Third Division in Award 1314. The Organization resists this contention of the Carrier upon authority of Cases 85 and 87 of Decisions of Railway Adjustment Board No. 1 and Decisions 943 and 1618 of Train Board of Adjustment, Western Division. In those cases it is held that the employe is entitled to recover the amount he would have earned had he not been laid off without deduction of wages actually earned from other sources during the period he is laid off. However sound those decisions may be they have been superseded by the decisions of this Board above mentioned, i.e., Award 5862 of the First Division and Award 1314 of this Division. Under the rule adopted by these awards, claimant is entitled to recover in the amount of her net loss of **wages.** In other words she is entitled to recover the amount she would have received from the Carrier during the period she was laid off less such sum as she **actually earned in other employment** during that period. It appears from the record that Miss Allen earned $10.00 during the time she was laid off." (Emphasis supplied.)

The Division's attention is also directed to the following portion of the court's Oral Opinion and Findings of Fact and Conclusion of Law in the **Case of Brotherhood of Maintenance of Way Employes, by Luther E. Rhyne, a member of the said Brotherhood and an officer thereof, being its General Chairman of Employes of the Quanah, Acme and Pacific Railway v. Quanah, Acme and Pacific Railway Company,** (District Court of the United States, Northern District of Texas, Dallas Division No. 772 Civil):

> "It would not be right to allow him to recover what he would have made from the defendant Railway and also keep in his pocket what he did make with other employers during the time."

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the Board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

Claimant was employed as a machinist in carrier's shops at Roseville, California. On January 10, 1951, he sustained personal injuries while in the performance of his work and was not able to return to work until March 23, 1953. Carrier refused to permit claimant to return to work on March 23, 1953, claiming that he had voluntarily relinquished his employe relationship with the carrier. He claims that he should be restored to service and paid for all time lost.

The facts are: On November 20, 1951, following his accident on January 10, 1951, claimant filed suit against the carrier under the Federal Employes Liability Act to recover damages in the amount of $50,000.00. On October 20, 1952, he made application for a disability annuity under the Railroad Retirement Act. The trial of the damage suit commenced on October

20, 1952. Three days later and before the close of the trial, the case was settled, claimant receiving $17,000.00. The evidence adduced at the trial by the claimant was to the effect that he had suffered a contused spinal cord and tearing of the ligaments of the back, resulting in instability of his lumbar spine causing an overriding of the facets of several of the lumbar vertebrae; that a spinal fusion would possibly have to be performed with uncertainty of result, and that claimant probably was wholly and permanently disabled and would never be able to return to his work as a machinist. The $17,000.00 was paid and a receipt therefore taken on November 7, 1952. On March 23, 1953, five months later, claimant demanded that he be put back to work because he was fully recovered from the injuries sustained.

Claimant has no claim. An employe may not contend successfully that he is able to work after tendering evidence in court that he is totally disabled and securing a settlement on such basis. He cannot in good conscience recover a large settlement for loss of earning capacity on the theory that he is wholly and permanently disabled, and then, after receiving the amount, change his position and assert that his earning capacity has been completely restored. He is estopped to deny his total and permanent disability under such circumstances. The awards of this Board and the decisions of courts generally support this reasoning. Awards 1186, 1297, 1672, Second Division; Awards 6479, 6483, 8300, 15543, First Division; Scarano v. Central R. Co. of New Jersey, 107 Fed. Supp. 622, on appeal 203 F. 2d. 510; Buberl v. Southern Pacific Co., 94 Fed. Supp. 11; Pendleton v. Southern Pacific Co., 21 L. C. 883 (U. S. D. C. Cal.).

It could possibly be urged that the foregoing citations of authority do not apply where the case was settled on a compromise basis. The rule is the same where the claimant alleges or produces evidence that he is totally disabled. It is conclusively presumed that the evidence he produced before the court induced the compromise settlement that terminated the litigation. The case of Wallace v. Southern Pacific Co., 106 F. Supp. 742, is in point on this question. In that case, the litigation was terminated by a compromise settlement of $17,500.00. The rule was applied to him. The principle is well stated in Texas Co. v. Gulf Refining Co., 26 Fed. 2d 394, as follows:

> "A party, who in litigation with his adversary has, with knowledge of the facts, asserted a particular claim, title or right, cannot afterward assume a position inconsistent with such claim, to the prejudice of the same adversary, who has acted in reliance on such claim being as it was previously made; in other words, a party who, for the purpose of maintaining his position in litigation, has deliberately represented a thing in one respect, is estopped to contradict his own representation by giving the same thing another aspect in litigation with the same adversary as to the same subject matter."

For the reasons stated, the position of the claimant cannot be sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July, 1954.