Award No. 3148
Docket No. 2963
2-L&N-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Dudley E. Whiting when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That the Carrier violated the terms of the agreement on April 10, 1957, when the name of Carman Helper J. A. Pearson was removed from their Montgomery, Alabama seniority roster and again on May 16, 1957 when he was refused his right to return to the service.

2—That accordingly the Carrier be ordered to restore the name of Carman Helper J. A. Pearson to service with all seniority rights unimpaired and compensated for all time lost, including May 16, 1957.

EMPLOYES' STATEMENT OF FACTS: Carman Helper J. A. Pearson, hereinafter referred to as the claimant, was employed by the carrier at their Montgomery Shops on November 19, 1951 and remained in their service actively until injured on February 26, 1955.

On May 14, 1955 after being released by the company doctor, he returned to active service and remained therein until he became ill on the night of March 13, 1957. On April 10, 1957 the carrier's master mechanic wrote the claimant indicating his name was being removed from the seniority rosters at Montgomery, Alabama. A copy of that correspondence is submitted herewith identified as employes' Exhibit A.

Under date of April 18, 1957 the carrier's general foreman wrote the claimant confirming the assertions of the master mechanic. Copy of that correspondence is submitted herewith identified as employes' Exhibit B.

presented himself to the railroad for reemployment, seeking to assert his seniority rights under the collective bargaining agreement, and the company refused to reemploy him or to give him a physical examination to determine his fitness for reemployment. He appealed through company channels to the chief official designated to handle such disputes, but failed to obtain reinstatement. He did not take his case to the National Railroad Adjustment Board, but brought a suit in the United Staes District Court. Disrict of Oregon, alleging that the Union Pacific breached the seniority provisions of the collective bargaining agreement by refusing to rehire him. He sought specific performance of the contract through reinstatement with back pay or, in the alternative, damages for wrongful discharge.

The court decided in favor of the defendant railroad company, and after citing the **Scarano v. Central Railroad of New Jersey** case, which it characterized as the leading authority for the rule of estoppel, stated:

> "* * * The **Scarano** rule applies and Sands is estopped from maintaining in this case that he is physically capable of returning to his old job. The justice of this result is apparent when one considers the dilemma facing the railroad when Sands asked to return to work. The carman's job involves heavy labor. It is no job for a man with a bad back.
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> "* * * and in view of the medical testimony, it was not only possible but probable that Sands' chronic back injury would soon recur if he were permitted to come back on the job. If it did, the railroad might face a claim for damages for additional aggravation of his chronic back condition. I think the railroad was justified in declining this risk * * * Since Sands himself introduced that (medical) testimony and received a settlement based upon it, he cannot now be heard to attack it."

CONCLUSION

Carrier reiterates that when Claimant Pearson alleged permanent disability resulting from his injury, substantiated that allegation by sworn testimony and medical proof, secured a substantial jury verdict, and accepted payment in settlement of the judgment, he thereby legally established his permanent disability and thereafter the carrier was not obligated to employ him or to continue his name on the seniority list.

Furthermore, having thus legally established his permanent disability, Pearson is now estopped from taking an inconsistent or contradictory position to his earlier contention as he is attempting to do when he asks this Board to order his restoration to carrier's service with pay for time lost since his removal from the seniority roster. To sustain Pearson's claim and order him restored to service with pay for time lost since he accepted payment of the judgment would be permitting him in this subsequent action to disavow the sworn statements and contentions upon which the substantial jury verdict was based. This would, of course, be highly inequitable, unconscionable and a travesty on justice. The claim is wholly without merit and should be denied in its entirety.

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.

Parties to said dispute were given due notice of hearing thereon.

This is not a case of an employe claiming, recovering judgment, or being paid for total and permanent disability. This employe returned to work about three months after his injury and remained in service until two months after recovering a judgment for such injury, when he became ill. While so out of service he was notified of the removal of his name from the seniority roster. Under the circumstances of this case such action was a violation of the agreement.

Later claimant applied for return to service and presented two doctor's certificates. One simply said he is able to return to work, the other recites that he complains of dizzy spells and it appears that he had blacked out on at least two occasions. Under the evidence shown the claim for restoration to service and pay for time lost must be denied.

AWARD

Claim for restoration to seniority roster is sustained and claim for restoration to service and pay for time lost is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 25th day of March, 1959.