Award No. 5511
Docket No. 5428
2-SP(PL)-SM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered

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PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Sheet Metal Workers)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the current agreement on August 20, 1965 when it removed Sheet Metal Worker Earl A. Roberts' name from the seniority roster, closed his record as an employe and thus terminated his employment relationship.

2. That accordingly, Carrier be ordered to:

(a) Restore Sheet Metal Worker Earl A. Roberts, hereinafter referred to as Claimant, to the seniority roster with all rights unimpaired.

(b) Compensate Claimant at the pro rata rate of pay for all time lost since August 13, 1965 until this claim is satisfactorily disposed of and the Claimant returned to service.

(c) Make Claimant whole on all vacation rights.

(d) Pay the Hospital Association dues for hospital, surgical and medical benefits for all time the Claimant has been held out of service.

(e) Pay the premiums for a group Life Insurance and for any and all benefits he would have normally received, enjoyed and would have been available to him had he been permitted to return to work.

EMPLOYES' STATEMENT OF FACTS: Sheet Metal Worker Earl A. Roberts, hereinafter referred to as the Claimant, entered the service of the Southern Pacific Company (Pacific Lines), hereinafter referred to as the Carrier, in 1926 as a Sheet Metal Worker Apprentice and upon completion of his apprenticeship was employed as a Sheet Metal Worker, and enjoyed an employment relationship with the Carrier since the year 1926. On October 29, 1962 the Claimant was assigned as a Sheet Metal Worker to the Locomotive Department Repair Gang in Carrier's Mechanical Department Repair Facilities at Sacramento, California. Among his assigned contractual duties was that of purging acetylene lines when requested to do so by the supervisor having jurisdiction over him, and on said date Claimant was assigned to the purging of acetylene lines. While performing said duties on October 29, 1962, Claimant sustained severe injury to his eyes and face. Claimant was immediately given first aid and rushed to the hospital, where he spent considerable time recovering from his injury. Upon discharge from the hospital, Claimant continued to recuperate at home, and on or about December 1, 1963 advised his doctor that he would like to try to return to work. The doctor advised him he would see about giving him a trial run and considerable discussion was had with the Claimant and various Carrier Officers regarding his return to work, all to no avail.

Being unable to persuade the Carrier into permitting him to return to work and being unable to negotiate a satisfactory settlement with the Claims Department of Carrier for the injury sustained, Claimant, through the firm of Perkins, Carr & Anderson, Attorneys at Law, Sacramento, California, filed a damage suit in the Superior Court of the State of California, in and for the City and County of San Francisco, in 1964. Trial was held in December, 1964 and early January, 1965. On January 7, 1965, a Jury awarded Claimant the sum of $165,000.00 Damages, and on August 2, 1965, Carrier paid the Claimant in the gross amount of $171,380.68, which included interest from January 8, 1965 and costs. Copy of the Satisfaction of Judgment entered in the Superior Court of the State of California, in and for the City and County of San Francisco, is attached hereto as Exhibit A.

On or about August 13, 1965, Claimant presented a Return to Work Release from the Southern Pacific Memorial Hospital Department, signed by Dr. Swett, to Mr. D. Hoffman, Relief Pipefitter Foreman. Mr. Hoffman informed Claimant that he would see his superior for instructions. A copy of the Return to Duty slip presented by Claimant is attached hereto as Exhibit B. By certified letter dated August 20, 1965, over the signature of Superintendent of Shops E. I. Norman, Claimant was notified that his employment relationship with Carrier had been relinquished by and through the representations made by him and on his behalf in the course of his damage suit against Carrier for damages allegedly arising out of an incident at Sacramento, California, October 29, 1962, and that his name was being removed from the seniority roster and his record as an employe closed. Copy of the letter dated August 20, 1965 is attached hereto as Exhibit B-1.

By certified letter dated October 5, 1965, Local Chairman of the Sheet Metal Workers, Nicholas LaFranco, filed an official claim with Superintendent of Shops E. I. Norman in behalf of Claimant contending that Carrier's action was in violation of the terms of the controlling agreement and requesting Carrier to return Claimant to its service. Copy of this letter is attached hereto as Exhibit C.

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 waived right of appearance at hearing thereon.

On October 29, 1962, Claimant sustained on-duty injuries while purging a gas line on Carrier's property. He filed a lawsuit against Carrier on November 22, 1962 under the Federal Employers' Liability Act, claiming damages for permanent injury and resulting loss of working ability as direct consequence of the serious injuries that he suffered. At the conclusion of the trial, the jury returned a verdict in favor of the Claimant for $165,000 and expenses. Thereafter, Carrier paid the judgment in the amount of $171,380.68 on August 2, 1965.

On or about August 13, 1965, Claimant presented a Return to Work Release to Carrier and was notified by certified letter, dated August 20, 1965, that his employment relationship with Carrier had been relinquished by and through representation made by him and on his behalf during the course of his damage suit against the Carrier. The instant claim was filed on October 5, 1965, alleging Carrier's violation of Rule 39 of effective Agreement between the parties and the unwarranted dismissal of Claimant from service. Carrier denied the claim which was then duly processed through the appeals procedure on the property and is properly before us for determination.

The gravamen of Petitioner's position is that recovery of damages for permanent injury and resulting loss of working ability through a civil action in the Supreme Court of California does not automatically terminate the Claimant's rights under the applicable Agreement between the parties nor justify his removal from the seniority roster without a hearing under Rule 39 of said Agreement.

Carrier contends that Rule 39 is inapplicable because the dispute involves physical disability and not discipline; that Claimant exercised an election of remedies in which the Court took cognizance of his anticipated loss of future earnings and retirement benefits as well as his loss of earnings prior to trial and other pecuniary loss at that time; and finally that Claimant is estopped from seeking restoration to service because of representations made by him or on his behalf during the civil action concerning his permanent disability and incapacity to perform his duties as an employe of the Carrier.

Although the civil court action filed by Claimant was based upon a charge of negligence, the issues considered by the court necessitated consideration of credible medical evidence, including diagnosis and prognosis as to Claimant's permanent disability, to determine whether or not he was entitled to recover for loss of future earnings and for future suffering likely or probably to be incurred as a proximate result of injuries suffered by him. The verdict in the amount of $165,000 clearly reflects compensation for both past

loss of earnings and prospective earnings during the estimated ten year period remaining prior to Claimant's anticipated retirement at sixty five years of age.

Analysis of the record in this case convinces us that Claimant or his representative introduced evidence during the court action calculated to convince the jury that Claimant was permanently incapacitated from performing his regular duties with Carrier, and that the resulting judgment was for total and permanent disability. Carrier's conclusions as to Claimant's physical disqualification were predicated on the credible representations offered in evidence during the civil action concerning the extent of Claimant's physical impairment, and Carrier's refusal to reinstate Claimant under the circumstances was neither arbitrary nor capricious. Moreover, Rule 39 of the effective Agreement is inapplicable as the instant dispute involves neither discipline nor dismissal.

Various precedents relied on by the Petitioner in this dispute are clearly distinguishable from the particular facts and circumstances involved in this dispute. Accordingly, we must conclude that Claimant is estopped from now urging that he was wrongfully discharged by Carrier in violation of his contractual rights and the claim will be dismissed.

AWARD

Claim is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July, 1968.

LABOR MEMBERS' DISSENT TO AWARD NO. 5511

The majority are in gross error when they dismissed the claimant's case from this Division. In a sense, they denied him his day in court on the pure and simple grounds of "estoppel."

The Carrier has the right to discharge an employe under the Agreement for cause. We contend it is not just cause to dismiss an employe or take away his seniority when he asserts his legal right to bring an action against his employer, due to an injury as a result of his employment. There is nothing in the craft agreement, nor has the Carrier shown for the record, anything which would deny an employe the right to pursue or seek such remedy in the courts. In fact, such an agreement would be in direct conflict or violation of the Federal Employer's Liability Act, as well as an abridgement of one civil right. See Second Division Award 2500, page 14, which we quote in pertinent part:

> "It is his legal right to bring an action against his employer, based on a right which arose out of the employment relationship. We find nothing in the agreement denying an employe the right to pursue a remedy in the courts for an alleged injury sustained during the course

of his employment. We believe any such arrangement, by agreement or otherwise, would tend to abridge a civil right belonging to all citizens. The right to appeal to the courts for the redress of wrongs is a fixed part of our way of life. **We cannot sustain any action which would penalize the claimant for exercising that right.**" (Emphasis ours.)

The majority's ruling here is a direct penalty upon the claimant when they refuse to rule on the specific dispute and remedial action sought, point by point.

DISPUTE:

"That the Carrier violated the agreement on August 20, 1965, when it removed Sheet Metal Worker Earl A. Roberts' name, from the seniority roster, closed his record as an employe and thus terminated his employment relationship.

REMEDIAL ACTION SOUGHT (POINT BY POINT):

"(A) Restore Sheet Metal Worker Earl Roberts . . . to the seniority roster with all rights unimpaired.

(B) Compensate claimant at the pro rata rate of pay for all time lost since August 13, 1965, until claim is satisfactorily disposed of . . .

(C) Make claimant whole on vacation rights.

(D) Pay the hospitalization dues . . .

(E) Pay the premiums for group life insurance and for any and all other benefits he would normally receive."

Instead of ruling on the specifics of this case, the majority categorically dismissed the issue properly before them, based on at least some degree of assumption of what a jury in a civil case "intended" when the plaintiff was awarded a sum of money; i.e., for example, to quote in pertinent part:

"The verdict in the amount of $165,000 clearly reflects compensation for both past loss of earnings and prospective earnings, during the estimated ten year period remaining to the claimant's anticipated retirement at age 65."

No one can ever state with **exactitude** precisely what the verdict of a jury intended to compensate the plaintiff for. Furthermore, this is not a matter left to speculation by the majority members of this Board.

Seniority is a **property right.** There is no showing by the Carrier, by agreement, stipulation or judgment, through the courts or through his counsel or of his personal volition, that claimant relinquished his seniority rights under the contract agreement. It is wrong for this Division to create a dismissal, in fact, through the principle doctrine of "estoppel."

First, the majority exceeded their authority by going outside of the agreement rules to draw conclusions which finalized their decision. They failed to specifically consider the point at issue projected in the record which was

properly before this Division and entitled to a more prudent and judicial consideration than it received. Further, they bar this claimant by "estoppel," denying him his right to full and proper course of due process under the Railway Labor Act and the shop craft agreement which requires the claimant to seek relief in the manner in which he did.

The use of legal doctrines and legal technicalities to escape making a decision on the merits of the record is improper and not in keeping with the legislative intent of Congress when it enacted and subsequently amended the Railway Labor Act.

The National Railroad Adjustment Board is not a civil court and does not afford the true principles of law and jurisprudence to the petitioners. Therefore, when the majority uses a legal doctrine which is proper in civil courts on the Adjustment Board, without affording the other party the full protection of due process, likened unto civil courts in testing and/or challenging the doctrine or principle relied upon, they are definitely, and have in this instant case, prejudiced the claimant under the procedures in due process of this quasi-agency.

Therefore, we are compelled to dissent.

R. E. Stenzinger
E. J. McDermott
C. E. Bagwell
O. L. Wertz
D. S. Anderson

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