Award No. 5851
Docket No. 5704
2-A&S-CM- '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Arthur Stark when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 154, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO (Carmen)

THE ALTON & SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF PETITIONER:

1. That the Carrier failed to comply with the procedural requirements of Article V, Section 1(a) of the August 21, 1954 Agreement.

2. That accordingly, the Carrier be ordered to compensate Carman Paul Larsen additionally as follows:

   (a) For wrecking service missed February 15, 1967 — 6-2/3 hours at time and one-half; February 16, 1967 —8 hours at time and one-half and 8 hours at double time; February 17, 1967 — 6-2/3 hours at time and one-half; February 18, 1967 — 3-1/3 hours at time and one-half; February 19, 1967 — 8 hours at time and one-half and 4-3/4 hours at double time; February 21, 1967 — 3-1/3 hours at time and one-half; February 22, 1967 — 3-1/3 hours at time and one-half; at double time; February 25, 1967 — 3-1/3 hours at time and one-half; and March 2, 1967 — 3-1/3 hours at time and one-half.

   (b) For service denied on the repair track — eight hours at the time and one-half rate for each day February 23, 27, and March 3, 1967.

3. (a) That under the current agreement, the Carrier improperly removed Carmen Paul Larsen from his regularly assigned position as wrecking crew member effective February 14, 1967.

   (b) And improperly denied him the right to work on the repair track subsequent to that date.

4. (a) That accordingly, the Carrier be ordered to restore Carman Larsen to his wrecking crew assignment, and his right to work on the repair track.

   (b) That he be compensated as set forth in part 2 (a) and 2 (b) of this claim and additionally compensated in the amount

of fifty-five (55) hours at the time and one-half rate of pay for wrecking service missed in the period March 4, 1967 through March 10, 1967 as well as all wrecking service and repair track service missed subsequent to March 10, 1967 as a result of Carrier's arbitrary action.

EMPLOYES' STATEMENT OF FACTS: Carman Paul Larsen, hereinafter referred to as the claimant, is employed by the Alton and Southern Railroad, hereinafter referred to as the carrier, at East St. Louis, Illinois. In addition to his position as car inspector, 4:00 P.M. to 12:00 P.M., Monday through Friday, he was a regular member of the wrecking crew, having bid in this position in response to Bulletin No. 24-63 dated November 11, 1963, and assigned by bulletin no. 24A-63 dated November 25, 1963.

After a meeting between claimant and General Car Foreman Mr. Leonard West, at which Local Chairman E. D. Cox was present, the following letter was issued to him:

"February 17, 1967

Mr. Paul Larsen
901 St. Mathew Drive
East St. Louis, Illinois

Dear Sir:

This will confirm my conversation with you and Mr. E. Cox, Local Chairman, Brotherhood of Railway Carmen, in my office at 2:00 P.M. February 13, 1967, at which time I informed you that effective February 14, 1967, you will not be permitted to work as a car repairman on the repair track or to work on the wrecker crew.

Your work as a carman is, therefore restricted to that of a car repairman inspector in the yard. This does not restrict you from overtime calls to which you are entitled to work as a car repairman inspector in the yard.

Yours very truly,

/s/ Leonard West
General Car Foreman

cc: Mr. E. D. Cox, Local Chairman
Brotherhood Railway Carmen"

Subsequent to February 14, 1967, the wrecking crew, with a member to replacce the claimant, was used to clear up wrecks and derailments at which additional time was made, and which the claimant was deprived of making, as follows:

February 15, 1967 at 2:00 A.M., MP 98116, 5 hour minimum call; and at 2:00 A.M., L&N 200078 and Engine 39, 5 hour minimum call.

February 16, 1967 — 12:40 A.M. to 6:40 P.M., I.C. 24202, SP 512245, D&H 5898 and Caboose #11, 8 hours at time and one-half and 8 hours at double time.

February 17, 1967 — 12:05 A.M., SLRX 4547, 5 hour minimum call; and at 8:00 A.M., I.C. 24505 and PRR 96156, 5 hour minimum call.

loss of earnings has been adjudicated in the Courts and he is entitled to nothing further for any possible loss of earnings. Furthermore, claimant is estopped from arguing the inconsistent and contradictory position that his back has now completely healed and that he is physically able to perform heavy manual labor without possible injury to himself. For these reasons, the claim should be denied.

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.

Claimant Paul Larsen was employed by carrier as a carman on May 9, 1952. Commencing November 25, 1963, in addition to his regular car inspector position, he also served as a member of the wrecking crew. On July 31, 1964 Claimant was injured while moving some rolls of paper in a box car. He was off work until October 7, 1964. Thereafter he resumed work on both his regular repair track and wrecking crew assignments.

On February 4, 1966 claimant filed suit against carrier based on his 1965 injury. The trail was conducted in January 1967. On January 24, 1967 the jury awarded Claimant $12,000. (Carrier subsequent appeal from this verdict was denied.)

On February 13, 1967 Carrier restricted Claimant to the work of a car repairman inspector in the yard (including overtime assignments). He was barred from working as a car repairman on the repair track or on the wrecker crew.

On March 4, 1967 Local Chairman E. D. Cox submitted a claim on Claimant's behalf for overtime wrecker crew assignments denied between February 15 and March 3, as well as three repair track assignments. The specific dates and hours of these claims are set forth in Clain No. 2 above.

On March 17, 1967 General Chairman C. E. Wheeler notified Carrier's Director of Personnel that, within a few days, the Local Chairman would supplement the March 4 claim by adding:

> "This is a continuous claim for all time in wrecking service and on the repair track that Mr. Larsen loses as a result of this violation . . ."

On April 12, 1967 Director of Personnel E. J. Maher replied to General Chairman Wheeler's March 17 letter, stating "We are willing to consider the claim of Paul Larsen . . . as a continuous claim for the purpose of simplifying the procedure."

On April 19, 1967 Local Chairman Cox presented a claim to the General Car Foreman for 55 hours for wrecking service missed by Larsen during the period March 4 through 10, 1967, stating, additionally, that "this is a continuous claim for all time in wrecking service and on repair track that Mr. Larsen loses as a result of this violation . . ." (See Claim No. 4(b) above.)

On May 5, 1967 Local Chairman Cox advised General Foreman West that, inasmuch as the sixty days for rendering a decision on the March 4 claim had expired without a company response, carrier was requested to "allow the claim as presented in line with the Agreement of August 21, 1954, Article V." (See Claim No. 1 above.)

On May 18, 1967 General Foreman West denied any time limits violation in light of General Chairman Wheeler's correspondence with Personnel Director Maher which, he affirmed, constituted a by-passing of the usual grievance steps. "If any impropriety exists," Mr. West noted, "it is the fact that the claims were not properly progressed by your organization."

On May 19, 1967 General Foreman West replied to Local Chairman West's April 19 claim. He denied the claim on its merits, while pointing out that Mr. West was not proceeding in accordance with the Organizations request and the agreement of Messrs. Wheeler and Maher. He concluded, "If your organizaton has changed its position and does not now wish to have these claims considered 'continuous claims', you have your Mr. Wheeler so advise our Director of Personnel so that the inconsistency of your procedure can be cleared up."

Thereafter the March 4 and April 19 claims were appealed, denied at all levels, and submitted to the Adjustment Board.

TIME LIMITS

Petitioner contends that Claims 1 and 2 should be sustained since Carrier did not comply with the requirements of Article V, Section 1(a) of the August 21, 1954 Agreement with regard to Local Chairman Cox's March 4, 1967 complaint. That Section provides, in part, that "Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance . . . in writing of the reason for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, . . ." Here, Petitioner asserts, Carrier's written denial should have been submitted within 60 days of March 4, 1967.

Carrier states that it relied on the exchange of correspondence between Wheeler and Maher and believed that the specific March 4 claim had been converted into a "continuous" one. That being the case, the claim could be sustained only if the violation is "found to be such" (Article IV, Section 3, August 21, 1954 Agreement).

Carrier also asserts that Petitioner's second claim is untimely, under Article V 1(a), and should therefore be dismissed. That Section declares that "all claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based". Here, Carrier notes, Claim 3 complains that Larsen was improperly dealt with on February 14, 1967. However, Claims 3 and 4 were not submitted to the General Car Foreman until April 19, more than 60 days later.

We are not convinced, after analyzing the sequence of events here, that any meaningful time limit violations occurred. The Organization's March 4, 1967 claim was promptly submitted within three weeks of Management's disputed action. This claim was in two parts: (1) a protest that it was "illegal to restrict carman Larsen from car repairman on the repair track or to work on the wrecker crew in which he has a regular bid in job . . ."; (2) a claim for

overtime pay for specified days falling between February 14 and March 4. This properly raised the basic question regarding the propriety of Management's decision to restrict Larsen's area of operations. It also, quite properly requested reimbursement for wages lost to date. The only possible gap, insofar as protecting Claimant's rights was concerned, was the failure to request payment for future similar deprivations of overtime.

On March 17 General Chairman Wheeler sought to fill this gap, if indeed it was one, and to avoid any possible dispute on the question of continuing claims. He informed Carrier's Director of Personnel (rather than the General Foreman who had received the claim) that the Local Chairman would "supplement" his original claim "within a few days". He noted that, if it could be agreed that "one claim will fill the bill, this will, of course, save considerable correspondence on the part of both you and I, as well as your subordinates and mine".

Although Local Chairman Cox received a copy of this letter, he did not submit a supplemental claim "within a few days". Not until April 19 did he write again, and then apparently for the purpose of (1) refiling claim about Larsen's improper treatment in February, (2) requesting pay for the period since March 4, and (3) making a "continuous claim" for all time lost, commencing February 1967.

Meantime, however, on April 12 Personnel Director Maher had informed General Chairman Wheeler, in writing, that Carrier accepted his proposal to consider the March 4 claim "as a continuous claim for the purpose of simplifying the procedure". That understanding, in our estimation, was controlling on Messrs. Cox and West. Accordingly, the April 19 claim became redundant; the specific pay claims were unnecessary and repetitious.

It is apparent, moreover, that Wheeler and Maher were in touch with each other concerning the status of the Larsen case during the period March 17-April 12. (Wheeler's April 12 letter refers to "our recent telephone conversation".) While nothing was directly said about waiving Article V time limits, it is fair to conclude that they were at least tacitly waived pending the outcome of the Wheeler-Maher discussions. It was not unreasonable for Management to delay its formal reply to the March 4 grievance until it was determined whether that grievance was to be supplemented or amended, and, if so, in exactly what form. Neither Claimant Larsen nor the organization were prejudiced by the brief delay which ensued.

Accordingly we shall deny Claim 1. The back pay claim in Claim 2, commencing with February 15, 1967, will be considered as part of Petitioner's continuous claim, in accordance with the Wheeler-Maher understanding.

LARSEN'S RESTRICTION

Carrier affirms that it was not only justified but had an obligation to discontinue assigning Claimant to work which, he had testified (during the trial of his suit against the Company), caused pain and discomfort in his back and neck. Car inspection work, to which he was confined, does not normally require as much heavy lifting or physical exertion as work on the repair track or wrecking service.

With respect to Claimant's physical condition, Carrier points to his testimony at the 1967 trial that (1) He had trouble with his back when he returned to work in October 1965; (2) He could not sleep at night because of pain in his back; (3) He frequently slept by kneeling on the flor and lying

across the bed; (4) His condition had not improved by the time of the trial; (5) He could not lift a baby without difficulty; (6) His neck hurt when he moved it.

Claimant and his attorney sought to have the jury find that he was permanently injured and that his ability to perform manual labor in the future was impaired, Carrier asserts. A judgment was sought from the jury which would fully compensate him for any loss of earnings during his working career. Since the jury verdict was in Claimant's favor, Carrier argues, the issue here is Res Judicata. Once the fact of Larsen's loss of future working ability as a carman has been determined, he is estopped from contending that he now has that working ability. Carrier cites Second Division Awards 1297 and 1672, among others, in support of its position.

Courts have also held, Carrier asserts, that an employer is negligent if it knowingly permits an employe with a physical impairment to work under hazardous conditions and that employe receives an injury by reason of such impairment.

* * *

The "sum and substance" of the whole doctrine of "Res Judicata," it is noted in Chapter XIX, Sec. 592 50 CORPUS JURIS SECUMDUM 11-12," is that a matter once judically decided is finally decided. The doctrine embodies two main rules, according to this authority, one of which is that "any right, fact, or matter in issue, and directly adjudicated on or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same . . ." While the doctrine "should receive a liberal construction, and should be maintained and applied without technical restrictions," it "should not be applied so rigidly as to defeat the ends of justice."

Estoppel has been defined as "a bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law" (Black's Law Dictionary, Third Edition).

Thus Board has not been unmindful of the doctrines of Res Judicata and estoppel. Thus, in Award 1297, the Second Division noted that the claimant's request to be permitted to return to service "is diametrically opposed to, and is a complete reversal of the position taken by him in a damage suit filed against the carrier." He had sued and was awarded a monetary verdict on the charge that he was "totally and permanently disabled, and incapable of gainful activity." Accordingly, the Board denied his claim that he was improperly removed from the seniority list. Similarly, Award 1672 the Board held that "when an employe alleges permanent disability resulting from the injury and pursues that claim to a final conclusion and obtains a judgment on that issue, he has legally established his permanent disability and the carrier is under no obligation to return him to service."

What, then, of Claimant Larsen? Should the doctrines of Res Judicata and estoppel be applied to his claim? The answer depends, in major part, on whether the record establishes that his claim for loss of earnings has already been adjudicated in the courts and that he is maintaining an inconsis-

tent or contradictory position with respect to his physical condition and ability to perform the disputed work. Note the following:

> 1. Claimant received clearance from the hospital before returning to work in 1964. There were no restrictions.
>
> 2. Following his return to work he performed all the required manual labor duties of his job in a completely satisfactory manner. He was required to lift weights and rearrange loads, as before. He lost no time. When asked, at the 1967 trial, with respect to his neck, "You don't have any disability in the sense you are not able to do anything in your employment?", he replied, "Yes, that is right." Again, "Isn't that also true of your back?" Answer: "I do my work, yes."

General Car Foreman West testified at the trial that, since 1964, Larsen had never, to his knowledge, declined an assignment.

> 3. In addition to his regular work, following the 1964 injury, Claimant worked more than 900 overtime hours in 1965 and more than 1000 hours in 1966. Most of this overtime was devoted to wrecking service and repair track work.
>
> 4. In closing argument at the 1967 trial, Claimant's attorney stated to the jury, in part: "Here is a man who was totally laid up for over two months . . . He was hospitalized. The doctor wouldn't even let him go back to work. He lost thirteen hundred dollars out of his own pocket right up to date. He has gone back to work and his foreman said he is a good worker; he is not a complainer. Are you going to penalize him because he doesn't lay down or lay off work because of his condition? He is not to be penalized because he tries to earn a living. He is to be paid for the pain and suffering that the record here shows and the medical testimony shows he is going through and will go through in the future. That is what I am asking money for. . . . If this man was not able to go back to work and earn a living I would be asking for ten times the amount I am asking you . . . (The request was for $15,000.) This man . . . has worked all of his life in one type of labor field. . . . He is going to stick with it the best he can. . . . He is not trained to be a white-collar worker, or a desk man or anything else. . . . He has to do his job the best he can no matter how it hurts. . . . He is going to do that the rest of his life. When you make your decision don't trade human pain and suffering for the age-old system of the railroad."
>
> 5. The opening argument of Claimant's attorney to the jury also stressed his ability to work: ". . . He has gone back to work and he works — I mean he does his job out there. His back is improved. . . ."

It must be concluded that, contrary to Carrier's assertion, Claimant did not seek to convince the court that he was unable to perform any particular assignment. Rather, he sought to demonstrate that he was entitled to monetary damages for the pain and suffering he had sustained and would continue to sustain. This is a case, in sum, in which the doctrines of estoppel and Res Judicata should not be "rigidly" applied.

It is true that the jury was presented with some conflicting medical testimony. Claimant's attorney had Dr. J. W. Deyton offer this diagnosis:

moderate strain of the neck with an inflammation of muscle fibers; moderate strain of the dorsal-lumbar back; very sever low back (lumbar) strain, with inflamation and discogenic syndrome (symptoms one would get from a disk). In this doctor's opinion the myositis lumbar and discogenic syndrome were permanent conditions; symptoms such as stiffness and pain in the morning, could continue intermittently with exacerbation and remissions. Moreover, this condition would impair a man's ability to perform manual work because the tissue would be subject to re-injury.

On the other hand, Dr. V. P. Blair, Jr., called by Carrier's attorney, testified that, based on x-rays, tests for reflexes and dimensions of muscles of legs and extremities, he had concluded that there was no objective evidence of disability and only a minimal arthritis.

Certainly, this conflicting testimony from expert witnesses may have raised some doubts in Carrier's mind concerning the advisability of continuing Claimant on heavy duty assignments. But there was no jsutification for removing him from such work on the sole basis of one doctor's testimony, particularly in light of the fact that the disability issue was not before the court. Pain and suffering, in this context, is not disability.

There are procedures, of course, for a carrier to restrict or remove an employe who is disabled. Normally, this would initially entail a physical examination by and recommendation from carrier's medical experts. The employe could then, if he so desired, seek his own medical guidance. If the two physicians disagreed, and the matter was not resolved, the Board could establish a panel of physicians with one "neutral" physician. But here, as we have seen, Carrier chose to rely on a diagnosis of one physician, at a trial, which diagnosis was contrary to the findings of its own doctors and not directly related to the claim in the law suit. Under all the circumstances we must conclude that such action was arbitrary and unreasonable.

For the reasons set forth above, Claims 3 and 4(a) will be sustained. Claim 4(b) will also be sustained (this covers Claims 2(a) and (b) as well) provided, however, that any overtime actually worked during the hours covered by the claims, since February 14, 1967, be substracted in the calculation of back pay.

AWARD

1. Claim 1 is denied.

2. Claims 2, 3 and 4 are sustained in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February, 1970.

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