

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12969
Docket No. 12841
95-2-93-2-207

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers, Local Union No. 214
(
(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

- "1. That the Chicago and North Western Transportation Company violated the current agreement, effective December 1, 1985, as amended, in particular, but not limited to Rule 28 (a), when Carrier officer failed to timely deny the claim of Electrician Marvin L. Schnepel within sixty (60) days, and failed to allow the claim, as provided in the aforementioned Rule 28 (a).
2. That the Chicago and North Western Transportation Company violated the current agreement, in particular Rule Nos. 13, 14, 15, 16, when the Carrier's officers refused him the exercise of his seniority and improperly withheld him from service from September 28, 1992.
3. That the Chicago and Northwestern Transportation Company promptly return Mr. Schnepel to service with all seniority rights unimpaired and make him whole for all lost wages and benefits lost, including but not limited to vacation, insurance, hospitalization, railroad retirement rights and benefits, as well as interest on all monies lost at 8%, account of Carrier's most arbitrary, capricious and unreasonable action, beginning September 28, 1992, and continuing until Mr. Schnepel is rightfully returned to service."

FINDINGS:

The Second 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 waived right of appearance at hearing thereon.

Claimant was employed as an electrician at Carrier's Clinton, Iowa, Car Repair Shops. On August 28, 1987, Claimant suffered a severe on-duty injury to his left leg and ankle.

On June 26, 1990, Claimant filed an action under the Federal Employers Liability Act in the U. S. District Court for the Southern District of Iowa, Davenport Division, against the Carrier for \$2,000,000 in damages.

By letters dated December 27 and 28, 1990, Claimant was notified that Carrier's Medical Department had medically qualified him for return to work with a restriction on climbing ladders. Claimant made no effort to return to work.

The complaint filed with the U. S. District Court in June of 1990, was heard before a jury commencing August 24, 1992. On August 28, 1992, the jury returned a verdict favorable to Claimant and awarded \$253,700 in damages which included a significant amount for "lost future wages."

Claimant, not being satisfied with the Court's award, filed a motion for a new trial which was denied by the Court on September 8, 1992. On September 9, 1992, Claimant contacted the Carrier and made a request to return to work.

On January 7, 1993, Claimant signed a Satisfaction of Judgment for the amount awarded by the jury August 28, 1992.

On April 2, 1993, Claimant filed a motion alleging that Carrier made misrepresentations during the trial that unfairly prejudiced the verdict. The motion was denied on October 10, 1993. Carrier has submitted a copy of the Court's decision of October 10, 1993, with its submission to this Board. The Organization argues that this Board should not give any consideration to the October 10, 1993, Court decision as it was not made a part of the handling on the property as required by Circular No. 1 of this Board.

The basis of its argument is that it filed this dispute with the Board on October 13, 1993, closing the record of handling on the property, and Carrier did not submit the Court's decision until October 21, 1993, and accordingly, it is untimely.

The Organization's argument overlooks two important considerations. First, Claimant was party to the Court action and the decision of the Court was received by him and his counsel becoming a part of the overall handling of the dispute. Secondly, the Court's decision of October 10, 1993, is a public document which may be properly submitted at any time during the proceedings before the Board. Numerous Awards of the Board have so held over the years.

The Court's decision of October 10, 1993, bears directly upon the heart of the dispute and this Board must give consideration to the decision in arriving at a decision on the claim before it. The Court's decision, in pertinent part, reads:

"Plaintiff and his physicians all testified it was medically unsafe for Plaintiff to climb the stairs necessary to work as a crane operator. Plaintiff's counsel reaffirmed this fact during closing argument--after Mr. Schmidt had completed his testimony. In *Lewandowski v. Nat'l RR Passenger Corp. (Amtrak)*, 882 F.2d 815 (3d Cir. 1989), the Third Circuit affirmed the use of 'judicial estoppel' to deny reinstatement to an injured railroad employee. The employee had earlier received a judgment in a FELA action in which he claimed he was physically unable to perform the work required. Similar to the present case, the plaintiff's physicians testified that although the plaintiff was not completely 'unemployable,' he was unable to perform the physical labor required by the railroad. The jury nevertheless returned a verdict for lost wages lower than that requested. ID. at 815-16.

Quoting from an earlier Third Circuit case, the *Lewandowski* court stated in part:

'A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with this earlier contention.'

ID. at 819 (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 512-13 (3d Cir. 1953)).

The Court finds Lewandowski to be particularly persuasive in the present case. Plaintiff had his 'day in court,' and failed to establish by 'clear and convincing evidence' that a material misrepresentation was made to the jury."

Contrary to allegations made by the Organization, this Board can find no violation of Rule 28 - "Time Limit on Claims." Letters written to Carrier's Shop Superintendent by Claimant dated September 28, 1992, and November 10, 1992, cannot be construed to be claims as contemplated by Rule 28(a). They claimed nothing.

We have carefully reviewed the extensive record submitted in this dispute, which includes transcript of testimony before the Court, its decisions, and a number of prior Awards furnished by the parties. In doing so we note Claimant's cause was vigorously pursued on the property and before this Board by the Organization. It could not, however, overcome the position maintained by Claimant, his physician and counsel in his District Court action that he was permanently disabled to perform physical labor required by Carrier. No evidence to the contrary was submitted to the Carrier. The doctrine of estoppel applies to this claim. See Second Division Awards 11464, 12098, 12146 and Third Division Awards 23830, 24116, 28217, 28719, and 29780 for additional authority on the doctrine of estoppel.

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 Second Division

Dated at Chicago, Illinois, this 1st day of November 1995.