Award No. 2100
Docket No. 1925
2-SAL-MA-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David R. Douglass when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

SEABOARD AIR LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Machinist Helper C. D. Ford has been damaged by the improper termination of his seniority rights under the current agreement through hasty unilateral action of the Seaboard Air Line Railroad Company effective on and since April 20, 1954.

2. That accordingly the said railroad company be ordered to make this employe whole in the matter of seniority and wage losses retroactive to and including April 20, 1954.

EMPLOYES' STATEMENT OF FACTS: Machinist Helper C. D. Ford, hereinafter referred to as the claimant, was employed on July 6, 1942 in Miami, Florida, by the Seaboard Air Line Railroad Company, hereinafter called the carrier, and the claimant has remained continuously in the service as such until April 20, 1954.

The carrier elected to effectuate a reduction in force on April 5, 1954 and this claimant as well as other employes were affected thereby. However, there was one of the senior machinist helpers off on the sick list and the claimant being the senior machinist helper furloughed was elected to fill this vacancy, although he was granted permission to begin taking his annual paid vacation on April 6, 1954. Thereupon, a helper his junior was restored to service to work in the place of the claimant until he returned from his vacation.

Nevertheless, the carrier elected to post a bulletin on April 16, 1954 which provided that, effective five days from date thereof, forces will be reduced in the Diesel Shop one machinist helper and this eliminated the claimant's filling the sick man's vacancy upon returning from his vacation, which occurred on April 19. Consequently, the claimant returned from his vacation to relieve the junior helper on Tuesday, April 20, 1954, as previously agreed upon just prior to entering upon his vacation, and which is affirmed by the letter dated April 21, 1954 addressed to the undersigned by the claimant copy of which is submitted herewith and identified as Exhibit A.

The Court further instructed the jury that in determining Mr. Ford's damages for the future the jury could take into consideration his life expectancy as indicated by the mortality table.

As pointed out, it would certainly be most unreasonable for this man to be awarded damages for future loss of earnings and then be permitted to return to work and suffer the same consequences that resulted from his employment prior to the suit and award by the jury.

As stated, this man was awarded $47,500, by the jury, and while that verdict has not yet been paid in view of appeal pending before the Supreme Court of Florida, it does not alter the fact that he received a Court award for future loss of earnings, and for the carrier to have permitted him to return to work in view of such award would have been setting up the means for duplicating recovery. This would be completely contrary to the basic philosophy underlying the holdings of the Courts and Adjustment Board that 'a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy.'

Therefore, we can see no basis for changing decision given you in our letter of September 10, 1954, declining claim that Mr. Ford be returned to service and paid for all lost time since April 20, 1954."

POSITION OF CARRIER: It is the position of the carrier that the seniority rights of claimant were not improperly terminated. This was a case of physical disability. Claimant sued carrier, alleging, and his doctors so testified, that his condition was of a permtnent nature; also, his counsel so argued (as clearly indicated by the court record quoted in carrier's statement of facts). As result thereof the jury awarded claimnt damages amounting to $47,500.

The carrier did not violate any rules of the working agreement by the alleged "improper termination" of claimant Ford's seniority rights. He terminated his rights when he successfully sued the carrier on the grounds of permanent disability, contending that such permanent disability, suffered at the hands of the carrier, rendered him thereafter incapable of working, not only in the railroad industry but in other similar trades as well. The judgment awarded the claimant was on the basis of permanent disability.

The carrier's position (that claimant Ford is estopped from contending for continuing seniority and pay for alleged time lost by virtue of having successfully sought an award for damages on the basis of permanent disability) has been so consistently upheld by awards of the National Railroad Adjustment Board and decisions of the courts that a lengthy argument in this case would only burden the record. Please see Second Division Awards 1672 and 1805—the first of which was made on a similar case on this property; Third Division Award 6740; First Division Awards 6479, 16819, 16820 and 16821, as well as other wards and court decisions referred to therein.

There is no merit to the claim and it 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.

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

The facts of record, along with the Supreme Court of Florida's Opinion covering this matter regarding the question of permanent injuries to the claimant, indicate to us that the carrier acted wrongfully in holding the claimant out of service for the period in question.

The Supreme Court of Florida's Opinion, being a matter of public record, is something which cannot be ignored by this Board.

Following judgment for the claimant in the lower court, the carrier did not abandon its contention that claimant had not suffered permanent injuries. Such contention was later upheld by the Supreme Court of Florida. It appears to this Board that the carrier was inconsistent when it took the claimant out of service, following judgment in the lower court, inasmuch as the carrier has never taken the position that claimant had suffered permanent injuries—in fact had permitted the claimant to work for some time following the injury and up until the time claimant took his vacation. It was during claimant's vacation that judgment was had against the carrier and claimant was not permitted to exercise his seniority following the judgment.

Considering all the facts before us, it is our opinion that the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 11 day of April, 1956.