Award No. 5453
Docket No. 4476
2-B&O-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. Under the current agreement the Baltimore and Ohio Railroad is improperly depriving Carman George M. Lyons of his rights to service and earnings.

2. That accordingly, the carrier be ordered to allow the Claimant returned to service and paid for the time lost since medical evidence was presented to them on March 19, 1962, showing him to be in good physical condition.

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.

The instant case comes before the Second Division of the National Railroad Adjustment Board for the second time as the result of the Order and Decree of Federal District Court Judge Abraham L. Marovitz who issued his final judgment order on May 7, 1968, in the case known to the U. S. District Court as System Federation No. 30 v. Braidwood, et. al. No. 67 C 76708.

The Federal District Court found as follows:

"THE COURT CONCLUDES that there is before the Court no genuine issue as to any material fact, that no trial is required, and

that Plaintiffs are entitled to judgment pursuant to Sec. 3 First (q) of the Railway Labor Act setting aside Award No. 4692 and remanding the proceedings to said Second Division for further action in accordance with the opinion of this Court rendered on April 19, 1968, and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Award No. 4692 of the Second Division of the National Railroad Adjustment Board be and the same hereby is vacated and set aside;

2. These proceedings are hereby remanded to the said Second Division, and it is hereby directed to reopen its Docket No. 4476; to hear and determine the dispute before it in said docket, which hearing may include the convening of a panel of neutral doctors; to decide and determine the issues raised by the claims and defenses asserted by the parties in said docket; and to render an award disposing of the claim or claims therein on their merits;"

It would not appear that any good purpose would be served by repeating either the material which appears in Award No. 4692 or the arguments advanced by the U. S. District Court except for the following quotation from the "Memorandum Opinion", dated April 19, 1968, and which appears on pages 20 and 21 of the said "Opinion":

"We believe the statutory rights of the plaintiffs herein may well become 'atrophied' unless the Board is compelled to decide the instant dispute on the merits. Since we feel that the Board's Award No. 4692 does not comply with either the requirements or spirit of the Railway Labor Act, we need not accord it conclusive effect. Pursuant to Sec. 153, First, (q), we remand this case to the Second Division for proceedings not inconsistent with this opinion. Such proceedings, of course, **may** include the convening of a panel of neutral doctors, pursuant to **Gunther**, but also should decide the issue of estoppel raised by the carrier. Of course, we do not imply any opinion as to the merits of this case, for that is solely the province of the Board. But, in our judgment, it **must** exercise its judgment thereon. The carrier's presumptuous suggestion that we should not disturb this Award because it reached the right result for the wrong reasons, would amount to our issuing a ruling on the merits. We shall decline the invitation to do so.

ENTER:.....
Abraham L. Marovitz
Judge"

This Division takes the position that what has been presented for the consideration and the judgment of the Board is solely the narrow legal issue of deciding the instant case on the **merits** in strict accordance with the remand ordered by the United States District Court, Northern District of Illinois Eastern Division.

The Court's Order and Decree requires only that the said case be decided on its merits. It is the opinion of this Board that a panel of neutral doctors

pursuant to the Gunther case, be established to resolve the conflict in medical testimony concerning the ability of the claimant, George M. Lyons, to perform the duties of his craft. At the request of the carrier, which appears to be a reasonable one, the neutral doctor should be a psychiatrist. It would appear from the record that the major issue to be decided by the medical panel concerns itself with the fact that the claimant's neuro-psychiatrist, Dr. Manuel Sall, testified on page 17 of the original award number 4692 that claimant suffered from a "conversion hysteria" and that this condition has a definitive bearing on his capacity to perform the duties of his craft.

Carrier contends that the Board should also consider the issues of "time limits" and "equitable estoppel", both of which points were raised and argued orally before the Board. The Board, in the exercise of its judgment, is of the opinion that the Court's remand explicitly requires only that the Board render an award disposing of the claim or claims on their MERITS. It is the considered opinion of the Board that its decision as stated supra does exactly what the Court, in the proper exercise of its jurisdiction, has ordered it to do.

AWARD

Above case to be handled and disposed of in accordance with the decision supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June, 1968.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 5453

We dissent. We do not concur in the majority's uncooperative construction of the United States District Court's Opinion remanding this dispute to the Board, but since that opinion speaks clearly for itself there is no need for further comment in that connection.

Referee Seff, and the Labor Members, who composed the majority in Award No. 5453 do not say so, but they imply very bluntly that one reason they refused on this remand to even consider the facts in support of the two principal defenses interposed by the carrier ("time-limit-on-claims" and "estoppel") is that such defenses are unrelated to the "merits." Each of the three concluding paragraphs of the "Findings" implies, somewhat vaguely, that the United States District Court through its order and decree confined the Board to "the narrow legal issue" of deciding the instant case on the "merits" and thereby excluded **consideration** of the defenses of time-limit-on-claims and estoppel. During the course of the hearing on remand when a disagreement arose between Labor and Carrier Members, the Referee issued a ruling concerning the final judgment of the District Court. That ruling quoted and emphasized the same parts of the Court opinion which the majority have again set forth in these "Findings" (preceding the word "Enter"). The gist of the Referee's ruling at that time was expressed in the following short paragraph:

"It would seem clear that subjects like, 'time limits', and 'equitable estoppel' are not substantive and do not concern the MERITS of the dispute."

Following the issuance of the ruling of the Referee, the Carrier Members made the following motion — which failed for lack of majority —

"That the proposed ruling by the Referee be rejected and that the Division accept for consideration and decision the Carrier's defenses of time limit on claims and estoppel by prior judgment as required by Judge Marovitz' order of April 19, 1968, in Civil Action No. 67C708."

We find that the Referee's "ruling" and the "Findings" are consistent in the error of holding that the two defenses are not substantive subjects, and that they are not subjects in the category of meritorious defenses, **whatever facts might be proven in support of them.** It would be erroneous to infer, from the majority's recitation concerning those defenses (the "points were raised and argued before the Board") that the Board had considered the applicable facts. It is clear to us that they would not.

It is just at this point that the award departs from the precedents of this Division. The majority have been guilty of the same refusal to consider the merits of the defenses as System Federation No. 39 was in docket number 1564, covered by Award No. 1602. In that case the Union, pressing a claim for the return to active service of an injured employe who had recovered a substantial F.E.L.A. judgment ($26,319.10) for permanent injuries, refused even to consider the Carrier's defense that he was estopped by the prior judgment. In that case this Division, without a referee, remanded the case on the ground that the Railway Labor Act required that the parties make a sincere effort to solve the dispute, and that a mere perfunctory conversation or reference to the defenses was inadequate. Later, when the dispute in docket number 1564 was again before the Second Division upon the same claim (that J. T. Hardee be reinstated), the claim was denied. The following excerpts from the "Findings", Award No. 1672, covering that dispute, are truly representative of the Division's holding (Referee Edward F. Carter):

"It is not a violation of the agreement to bring suit against the carrier to recover damages against the carrier. But 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. The rule is aptly stated in Award 6479, First Division, wherein it is said:

'But when he has not only claimed but has collected damages for the total and permanent loss of his working ability, it is inconsistent to claim that he still has that ability and that the carrier must employ it or pay for it on a seniority basis. Having finally submitted the question to the jury and having collected judgment for the total loss of the ability to perform the services, not even disappointment in the jury's assessment of the damage can justify the claim that the carrier should employ those same services or in default pay for them again.'

The awards of this Board and the decisions of courts generally support this reasoning. We shall cite only a few: Awards 1186, 1297, Second Division; Awards 6483, 15543, First Division; Scarano v. Central R. Co. of New Jersey, 107 Fed. Supp. 622; Buberl v. Southern Pacific Co., 94 Fed. Supp. 11; Pendleton v. Southern Pacific Co., 21 L. C. 883 (U.S.D.C. Cal.)." [15 N.R.A.B., 2nd Div. 892, at 910.]

If the majority's award is to be construed as its own independent holding that a defense based upon claimant's non-compliance with the time-limit-on-claims rule is foreign to the "merits" of the dispute, regardless of the provisions of the rule and the facts, then it is sufficient to point out that the majority undertakes a general repudiation of this Division's precedents on this subject: See the following illustrative Awards of this Division, Nos. 3569, 3545, 3549 and 3656, some sustaining and others denying this defense by application of the provisions of particular time limit rule to the facts of the case.

Contrary to the supposition dealt with in the preceding paragraph, we nfer that the majority did not actually intend any such wholesale renunci-ıtion of our precedents, and that the majority simply considered that **in this** :ase the order and decree upon remand **prevented** the Division from giving :onsideration to the time limit defense (as also to the estoppel defense).)f course, as we implied at the outset, we think that the order and decree f April 25, 1968 as explained in the incorporated opinion of April 19, 1968, id no such thing. Whether the majority's response upon remand was some-hing more than a simple mistake of law upon their part is not for us to say.

H. F. M. Braidwood
F. P. Butler
H. K. Hagerman
W. R. Harris
P. R. Humphreys

nan Printing Co., Chicago, Ill. Printed in U.S.A.