

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

1. That the Louisville & Nashville Railroad Company improperly removed Carman R. W. Jenkins name from all overtime boards and deprived him from earning that which he would have earned at the overtime rates subsequent to December 30, 1981, and
2. Accordingly, the Louisville & Nashville Railroad Company should be ordered to compensate Carman R. W. Jenkins that which he would have earned had he not been removed from the overtime boards at Corbin, Kentucky, subsequent to December 30, 1981.

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 employes 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 key events leading to this dispute began when the Claimant brought an FELA suit against the Carrier in connection with injuries he contended were sustained by him while on duty. In early December 1981, a jury awarded the Claimant \$80,800.00 of which \$29,000.00 was for lost future earning power. It is this award that triggered the current dispute, for on December 29, 1981, the Carrier wrote the Claimant and stated:

"In a recent court case in the Jefferson Circuit Court, Kentucky, your testimony under oath was that you were physically unable to perform overtime work. As a result of your testimony, you were awarded a monetary compensation for future loss of overtime work on the L&N.

"Therefore, by your own admission that you are physically unable to perform overtime work, you will not be permitted to participate in overtime work and your name is being removed from the overtime board as of December 30, 1981."

As a result, the Claimant's name was removed from the Overtime Board effective with December 30, 1981.

The Claimant had been released to return to work both by his personal physician and the Carrier physician, on October 5 and 6, 1981, respectively. The record shows that after those dates, he returned to work on a regular basis, although not on the wrecker to which he had been assigned prior to his injury. According to the Claimant's testimony during the FELA trial, he "re-injured" himself, and because of this, missed one day of work after his return in October. During the trial, the Claimant also testified in response to the following question:

"Q163: Do you feel that you are capable of working any more than eight hours a day?"

"A: No, sir, I can't attempt it, because the time I get off from work, I'm tired and worn out, my back is sore and my left leg hurts me."

It is from this testimony that the Carrier concluded that its decision on December 29, 1981 was not disciplinary in nature since:

"After telling the jury under oath that you were not physically able to work more than an eight-hour day and, after having been awarded \$29,000.00 for lost future earning power, you are estopped from now contending to the Company that you are suddenly recovered and that you are physically able to work overtime."

Thus, it is the Carrier's contention that the principle of estoppel controls here. Since Claimant's earlier assertions at the trial resulted in monetary relief, he cannot now establish a position inconsistent with his earlier contentions.

The Organization dismisses the estoppel argument and maintains that by removing the Claimant's name from the Overtime Board, he was, in fact, disciplined without a fair hearing, as contemplated by Rule 34, Discipline. Moreover, the Organization, also pointing to testimony at the FELA trial, argues that the testimony relied upon by the Carrier was not taken in its proper context. It maintains that the Claimant spoke to the matter of his physical condition at the specific time of his testimony and not as to his future condition. Accordingly, given that he had been approved to return to work without medical restrictions, the Carrier improperly denied him overtime pay. In essence, the Organization contends that Carman work cannot be distinguished on the basis of pay rates as was done here by the Carrier.

The evidence shows that the Claimant had not been medically disqualified and that no physical restrictions had been placed upon him after he returned to work on October 9, 1981, following a back operation in 1980. However, it is apparent from the testimony at the FELA trial that he continued to have, at the time of the trial, "sore spells" for which he took medicine. In addition, by his own testimony at the time of the trial, he acknowledged that he became tired at the end of the work day. In fact, he did re-injure himself after he returned to work on the one occasion when he worked overtime prior to the Carrier's decision of December 29, 1981 that led to this claim. In effect, the testimony and other evidence of record leads to reasonable conclusions that the Claimant would have had problems for the foreseeable future with respect to his back. Therefore, given the nature of his injury and the other circumstances here, there is legitimate basis on which to conclude that the Claimant would be more susceptible to injury after he worked beyond the normal eight hours. However, these considerations were not the stated reason for denying the Claimant overtime. Rather, the Carrier chose to invoke estoppel and remove the Claimant's name from the Overtime Board on that basis. We do not find clear and convincing evidence to support the Carrier's position. We conclude that the Claimant's testimony, with respect to overtime, referred to his physical state at the time of his trial.

In addition, this is a Claimant who has been medically allowed to return to work on a regular basis. There is no evidence before us that indicates a consideration of lost overtime per se by the Court when it awarded the monetary damages. Moreover, the Carrier's actions effectively deprived the Claimant of bidding for certain positions and, under certain circumstances, affect his pay with respect to overtime on rest days and certain holiday pay entitlements. There is no showing in the record that the Claimant testified or that the Court considered or contemplated these restrictions when it ruled as it did. Accordingly, under these particular circumstances, the Carrier's estoppel contentions must fail.

Given all of the foregoing and in recognition of the Claimant's medical history and the nature of his physical problems, the Board finds that this claim may best be disposed of by the Claimant submitting himself to a physical examination and the medical judgment of the Carrier's Medical Officer to determine his physical condition to perform overtime work in accordance with the provisions of the parties' Agreement.

A W A R D

Claim disposed of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1985.