Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11621
SECOND DIVISION Docket No. 11300
89-2-86-2-114

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM:

1. That the St. Louis-Southwestern Railway Company violated the current controlling agreement when Carman T. S. Baker was not allowed to return to service on July 29, 1985 after furnishing a release to return to regular duties from his personal physician.

2. That the St. Louis-Southwestern Railway Company violated the time limit provisions of the agreement when Superintendent A. M. Henson failed to timely respond to General Chairman Mann's claim letter dated August 29, 1985.

3. That the St. Louis-Southwestern Railway Company be required to allow this claim as presented by returning Carman T. S. Baker to service immediately, allow him eight (8) hours pay at the proper pro rata rate, commencing July 29, 1985, crediting each day's pay to a calendar date and continuing until Carman Baker is returned to service, and credit him for vacation credits; all railroad retirement benefits; Aetna and Travelers insurance benefits that he has been deprived of.

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 waived right of appearance at hearing thereon.

On August 29, 1985, a claim was filed by the Organization on behalf of Claimant on grounds that he had not been permitted to return to service. The Carrier alleged that the Claimant was medically disqualified from doing so in view of prior "...court testimony concerning (an) orthopaedic problem and...physical limitations." On November 8, 1985, the Organization sent

correspondence to the Carrier requesting forfeiture of the claim because the Carrier was in alleged violation of the controlling Agreement's time limits' provisions of Rule 22.

The study of the record shows evidence that the claim was filed on August 29, 1985, and that it was not denied by the Carrier within the required sixty (60) days. The Organization presents a certified mail receipt, signed by a Carrier Officer, to the effect that the claim was filed on the date that the Organization states it was. On November 12, 1985, the Carrier responded that the letter had not been received because no record could be found of "...it being delivered to any officer of the Carrier." Apparently there was a breakdown in the line of communications at the Carrier. The Organization cannot be held liable for such, however, and evidence reasonably supports the conclusion that the Carrier was in procedural violation of the Rule at bar.

Prior to further deliberation on the merits of this case, the Board must establish what remedy is appropriate for violation of Rule 22. There is numerous precedent from various Divisions of the Board to the effect that violations of this type "...toll (a) Carrier's liability...as of (the) date" of the late denial. (Second Division Award 11187; also Second Division Awards 4853, 6370, 10754; Third Division Awards 24298, 25417.) The Board finds that the proper remedy for the Carrier's procedural violation of the Agreement is compensation for the Claimant at straight time rate from August 5, 1985, which is the date the Claimant requested return to work and "mark up as to (his) seniority", and November 12, 1985, which is the late date when the claim filed by the Organization was first denied by the Carrier.

The Board will now address the merits of the claim. The Claimant has a seniority date of November 1, 1974, and he was listed on the Carrier's 1985 Car Department Seniority roster as No. 14 of 23 on that roster. His name appears on that roster with the annotation: "Physical Disability." In its first late, and subsequent, denials of the claim on property the Carrier raises the doctrine of estoppel. It does so also in its Submission to this Board. According to the record the Claimant had filed suit in U.S. District Court for the Northern District of Texas for damages for an alleged personal injury which occurred on April 21, 1982. The trial was held on January 5 and 6, 1984. Claimant's testimony at that trial is part of the record before the Board. The Claimant testified that he was physically unable to perform duties as a Carman. A jury found in his favor with consequent judgment against the Carrier of $100,000.00. After this trial, the Claimant made his request on July 29, 1985, to mark up his seniority on August 5, 1985, as noted above. This request included a short, signed note by a physician who stated that the Claimant had been in his office on July 26, 1985, was "...doing fine", and was "...released to return to work full time, regular duties...."

The Carrier cites a number of prior Board Awards dealing with the doctrine of estoppel. These, and additional ones including Public Law Board Awards have been studied by the Board as well as the record of testimony by the Claimant at his January, 1984 trial. These are all public documents and are properly before the Board. The doctrine of estoppel has been succinctly stated in Third Division Award 6215. This Award states:

> "The basic philosophy underlying (such) holdings is 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."

(See also First Division Award 20166; Second Division Awards 1672, 7967 and more recently 10754 and 11187; Third Division Awards 24298, 25417; Public Law Board 3897, Award 5, inter alia). In the instant case the Claimant argued persuasively before a jury, under oath, that the injury he had received made him physically unable to perform duties as a Carman. He also testified that he "...didn't (even) try to pick up anything" at that time, that an attempt to learn to be an outboard motor mechanic which got to be "a lifting job" was abandoned, and that sometimes he "didn't (even) feel like getting out of the house." The jury believed the Claimant and damages were awarded accordingly. On the basis of evidence, this Board can do no different than the jury. As a result the Board believes that the instant case is of the type to which the doctrine of estoppel properly applies. Pertinent to cases such as this one, the courts have also established legal theory consistent with arbitral rulings in this industry. For example, in Jones v Central of Georgia Ry Co (USCD ND Ga) 48 LC par. 1856 the court ruled that:

> "It seems to this Court the applicable rule of law is firmly established that one who recovers a verdict based on future earnings, the claim of which arises because of permanent injuries, estops himself thereafter from claiming the right to future re-employment, claiming that he is now physically able to return to work."

On the record as a whole the claim must be denied on the merits. It must be sustained, however, on procedural grounds as indicated above with relief limited to straight time rate from August 5, 1985, through November 12, 1985.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1989.

LABOR MEMBERS'
DISSENT TO AWARD 11621
(Docket No. 11300)

Referee Edward L. Suntrup

The following dissent is respectfully made to Second Division, National Railroad Adjustment Board Award 11621. The eminent and distinguished Referee in rendering his decision does grave and violent damage to the controlling rules on this property. This eminent and distinguished Referee said in Award 11621, as follows:

> "....The Organization presents a certified mail reciept, signed by a carrier officer, to the effect that the claim was filed on the date that the organization states it was. On November 12, 1985, the carrier responded that the letter had not be received because no record could be found of "...it being delivered to any officer of the carrier." Apparently there was a breakdown in the line of communications at the carrier. The organization cannot be held liable for such, however, and evidence reasonably supports the conclusion that the carrier was in procedural violation of the Rule at bar."

The Rule at bar was on property Rule 22, which is the standard uniform Time Limits Rule in this agreement for the progression of grievances on this property.

The Referees', without exception, in Second Division Cases have uniformly held that when the employees violate the Time Limit Rules in on property handling, regardless of reason or excuse, the employees are totally, completely, and forever barred, because of their violation of the Time Limit Rule from progressing or handling that particular individual vio-

lation. It is readily apparent that in this Referee's eyes the responsibility of a Time Limit Rule is to be enforced only upon the employees and when the carrier violates that same rule the carrier is only to be punished under the agreement up until it untimely denies the claim.

It is redundantly clear from the record in this Award that the carrier advertently or inadvertently, as the case may be, completely, totally failed to respond to the claim timely and when it was reminded by the employees, by certified mail, and proven to the carrier by certified mail, that the carrier had indeed received the claim and failed to respond, only at that time did the carrier deny the claim. To limit the carrier's liability to a period of the filing of the claim until the carrier untimely denied the claim is to simply to degrade and demean the contract and is one more step towards rendering a Time Limits or Rule 22 violation as being meaningless.

The employees note with interest that the eminent and distinguished Referee in the reading of the material exchanged and submitted between the parties on the property, the Referee said:

> "...In its first late, and subsequent, denials of the claim on property the carrier raised the doctrine of estoppel."

The record in its entirety, as presented to this eminent and distinguished Referee, consisting of material exchanged

between the parties on the property reveals that the word "estopped" was used one time and was raised as an allegation in the denial of this claim at the highest level. The carrier did furnish an excerpt or a transcript of testimony of the claimant as held in Court Case CA 83273-8, January 5 and 6, 1984. That court transcript was simply furnished to the employees and no argument whatsoever was made as to its validity.

The material exchanged between the parties on the property clearly includes and shows the on property physical re-examination rule, which provides for medical doctors to make a medical determination of the physical condition of any employee. The carrier refused to implement that medical rule and let medical doctors make a medical determination.

The employees point out that irrespective of a persons testimony in court and of his belief as to his physical condition, that person is not a doctor. The fact that a person may or may not be damaged extensively and not be able to work as a result of those damages does not preclude the fact that at some point in time his body may heal itself and he may recover. The question of his recovery should not be placed in the hands of a Referee who has never seen the claimant, nor in the hands of the claimant himself, nor in the hands of the carrier officers. It has been held by many awards of different forums created under the Railway Labor Act that, "medical questions" should be decided by medical authorties. Patently,

this was not done in this case.

The employees respectfully point out that the awards presented to the Referee at the hearing, after the case had been moved off the property and the record closed, as well as court cases presented at the hearing, and not exchanged between the parties on the property, may very well be valid exhibits before the Board.

However, it is the employees position that all such arguments being desired to be used by the carrier before the Board should have been presented on the property.

By denying the claimant in this claim his right to the on property rule for a physical reexamination under the agreed to contract and for this Referee's degrading and damaging Rule 22, the on property Time Limits Rule, under the justification of Estoppel, simply degrades and damages those rules.

It is respectfully submitted that this award contains palpable error and is totally without precedental value in any case.

We Dissent

R. A. Johnson

Mark Filipovic

W. A. Hunt

R. E. Kowalski

B. T. Puffett