

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

1. That the Consolidated Rail Corporation violated the controlling agreement, on July 31, 1985, when by letter dated July 31, 1985, Manager-Labor Relations J. F. Glass denied Groundman Harkins request for a medical examination therefore preventing him from returning to active service.

2. That, accordingly Groundman Harkins be compensated, commencing July 31, 1985 to September 15, 1985, a days pay for each day, including overtime, that he would have earned had the Consolidated Rail Corporation not violated the controlling agreement.

3. That Groundman Harkins be granted all other benefits that would normally have accrued to him had the Consolidated Rail Corporation not violated the controlling agreement during the aforementioned period.

4. That the Consolidated Rail Corporation, forthwith allow Groundman Harkins to take a medical examination in order that he may return to active service.

5. This claim, as provided for under Rule 4-P-1 (i), is a continuous claim, therefore commencing with September 16, 1985 and each day thereafter that Groundman Harkins is prevented by Consolidated Rail Corporation from returning to service, claimant Harkins is to be compensated and granted benefits as set forth in No. 2 and 3 above.

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 June 18, 1985, the Claimant wrote a letter to the Carrier's Manager of Labor Relations that he wished to return to his job as Groundman, Third Rail, Electric Traction at the Carrier's Mott Haven, New York facility. In this letter he explained that he had established seniority on August 10, 1977, and was injured on the job on July 9, 1980, and was party to an "out of court" settlement in 1982. He explained that he was attaching to this letter a permission to return to work from his own doctor who had given him a physical. He stated that he needed a "...physical and a release from Conrail to return to my original job...which is now with Metro-North." On July 31, 1985, this letter was answered. In this letter the Carrier's officer states the following:

"We have reviewed this matter and agree that no written release of employment rights was obtained at the time of settlement of your case. However, we find that the monetary settlement of ...made on August 16, 1982 in connection with your injury, was predicated upon your contention that you were rendered permanently and totally disabled from performance of the duties of your position with the Corporation; and that those monies were awarded based on past lost earnings as well as future potential earnings.

Under the conditions outlined above, we hold that you are estopped from now contending your disability no longer exists.

Accordingly, your request for medical examination preparatory to return to our service is denied."

Upon receiving this denial the Claimant referred the matter to his Organization and on September 15, 1985, it filed a formal claim on his behalf, as outlined in the Statement of Claim of this case. In this claim, the Organization argued that the settlement implied no release of the Claimant's employment rights. This claim was answered by the same Carrier officer under date of November 19, 1985, with basically the same arguments found in his earlier letter to the Claimant. In this latter denial, however, the Carrier officer appears to argue that the claim filed was inappropriate because the Claimant was "...no longer an employee of Consolidated Rail Corporation." Therefore, he continues "...it is our decision not to entertain your letter in any way, shape or form as a claim under the Schedule Agreement." Nevertheless, as a "courtesy" this latter letter was to be considered the Carrier's "denial" of the claim. Absent resolution of the claim after conference and additional appeals this case was docketed before this Board.

A preliminary procedural question must be resolved first of all. The Organization alleges, on the property, that the Carrier was in violation of the time limits of the Agreement because there were more than sixty (60) days between the date the claim was filed on September 15, 1985, and the denial of the same on November 19, 1985. The Board notes from the record that this request for forfeiture is found in a document submitted to the Carrier with signature of the President of the Local who had filed the claim in September. The Organization's Exhibit D is a copy of a letter written by the Carrier Senior Director of Labor Relations to the Organization in which it is noted that the same claim had been discussed "on September 12, 1985" and that the "...Time limits outlined in Rule 4-P-1(f) will be extended accordingly." It appears that the case was being handled concurrently by different officers of the Organization with the Carrier and that there had been an agreement to extend the time limits. This is common procedure in cases such as this which have inherent complexities which must be studied and discussed by the parties in an effort to find resolution thereof. In view of the evidence of record the procedural objection raised by the Organization must be dismissed, and the conclusions of the Board must be based on the merits of the claim.

In regards to the Carrier's procedural argument that the Claimant had previously forfeited all of his employment rights due to a Court settlement resulting from a personal injury case, review of the record before this Board fails to support any such position.

Turning to the merits of this case, the facts indicate the Claimant was severely injured on July 9, 1980, when a pulley pulled loose from a wall and struck him in the face while he was on duty. The pulley weighed some 25 pounds. At the time of his injury the Claimant was working the Park Avenue tunnel near 72nd Street, New York City. In June of 1981 a complaint was filed on behalf of the Claimant in the U.S. District Court, Eastern District of Pennsylvania against Conrail. The action was brought under the Federal Employer's Liability Act and the Railroad Safety Appliance Act. The basis of the complaint was not only the severe injury received by the Claimant in July of 1980, but also because he had sustained earlier on-the-job injuries of a considerably severe nature on December 21, 1979. The latter accident occurred at the Carrier's Brooks Street Crossing, Croton Harmon, New York. The complaint stated that the "...plaintiff has been permanently injured and has lost large sums of money which he would otherwise have made...(had)...his earning capacity (not) been damaged and impaired." On August 16, 1982, the Claimant signed a General Release thereby releasing Consolidated Rail Corporation from any additional liability and claims. The issue here is whether the Claimant then had right, at future date, to request a return to work to his old position. The argument of the Carrier is that the Claimant was estopped from so doing by the settlement.

The Board has closely studied the record before it. This record shows that the settlement was made after the Complaint was filed with the U.S. District Court and that the latter states explicitly, in unequivocal language, at two different points, that the Claimant had been "permanently injured." The Board must only conclude, therefore, that there was a close relationship between the settlement and this allegation in the Complaint. This happened in 1982. Slightly less than three years later the Claimant then effectively argues that he is no longer permanently injured and as evidence presents a one sentence statement initialed by a General Practitioner which is dated July 9, 1985.

The doctrine of estoppel has been outlined in Third Division Award 6215 by means of the following language:

"The basic philosophy underlying these 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."

This doctrine has been espoused and applied to claims similar to the instant one in numerous Awards by various Divisions of the Adjustment Board and by Public Law Boards (See, for example, First Division Award 21066; Second Division Awards 1672, 7976, 10754, 11187; Third Division Awards 24298, 25498; PLB 3897, Award 5. This Division recently released Award 11621 which dealt with a circumstance comparable to the instant one. In that Award the Board stated that evidence and allegations presented and made before the court in order to win an award could not be nullified by the Claimant at a later point simply because it was to his advantage to do so. The only difference between this case and that one is that here an out-of-court settlement was made. In both cases there were pleadings of permanent injury.

A full review of the record before it leads the Board to conclude that the instant claim is of the type to which the doctrine of estoppel is to be applied. Arbitral ruling with respect to this doctrine are also consistent with court precedent. For example, in Jones v Central of Georgia Ry Co (USCD ND Ga) 48 LC par. 1856 (cited in Second Division Award 11621) the court stated:

"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 merits the claim cannot be sustained.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 25th day of January 1989.

10

10

10