NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23830
Docket Number SG-23981

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Boston and Maine Corporation

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Boston &Maine Corporation:

On behalf of Warren J. Silva, who Was injured on duty during November 1975 but not allowed to return to work when he requested to do so February 26, 1979."

OPINION OF BOARD: The record shows that Claimant entered Carrier's service on January 31, 1969, as au Assistant Signal Maintainer. He was subsequently promoted to Signal Maintainer and to Leading Signalmen. On November 20, 1975, while performing his duties, he was injured. He subsequently returned to work on December 6, 1976. On November 4,1977, he laid off sick on the contention that it Was due to the job related injury suffered in 1975. As a result of the alleged on-duty injury, Claimant entered suit in the United States District Court, District of Massachusetts, in 1978, asking judgment against the Carrier because of his lack of income due, the Carrier said, to being totally incapacitated for work.

During the trial of the case a neurosurgeon, Dr. Roth, testified under direct examination by Claimant's attorney:

"Q. And do you have a specialty?

A. I'm a neurosurgeon.

Q. And will you briefly inform us what neurosurgery is?

A. Neurosurgery is a surgical discipline that concerns itself with diseases involving the central and peripheral nervous systems, that is, those illnesses involving the brain, spinal cord, and any of the nerves wherever they may be found in the body, as well as the surrounding bony structures, such as the skull and spinal column, muscles and ligaments.

Q. In your opinion, doctor, can Mr. Silva anticipate at any time in the future that he will be able to engage in unrestricted employment as a signal maintainer?

A. I'm sorry, could I have that statement again or that question again?

My opinion is that his condition is now stable and will not change and consequently will not allow him now or at any time in the future to return to his former employment as you described.

Q. Is there any surgical remedy that you are aware of that would alleviate his condition or make him to the point where he would be able to return to the work force and do any kind of manual work?

A. No, there is no surgical remedy to his brain damage, neck injury or back injury to any significant degree.

Q. What would be the effect of the removal of disc material and splinting with a bone? would that make any change?

A. It would not be in my opinion common medical practice to operate on Mr. Silva *given* his present complaints because of the very low chance of improving his condition with any sort of operation whether it be a simple removal of the disc or removal of the disc with bone fusion. And I have not planned to do so and would not recommend it.

Q. will his personality and loss of memory *persist* for the rest of his life.

A. Yes, I think that's fixed.

Q. And will he continue to have pain from time to time for the rest of his life?

A. Yes, unfortunately."

In his testimony, the doctor revealed that claimant had suffered a permanent disability *which* would cause him pain, loss of memory for the rest of his life; that there *was* no surgical remedy for his brain damage, neck injury or back injury; that it would not be in his opinion, common medical practice to operate on Claimant because of the very low chance of improving his condition with any sort of operation.

The Claimant testified:

"Q. Now, during this time that you started in doing this physical work, in the fall, '77, what were you experiencing in connection with your back.

A. The pain in my back had increased so much so I had to go back to the doctor on account of it. And I eventually ended up in the hospital again.

Q. And were you readmitted to the Symmes Hospital on November 9. 1977.

A. Yes, sir, I was.

Q. And were you there through Nwember 18, 1977?

A. Yes, I was."

The Claimant's attorney entered into the record the amount of wages received by Claimant from the Carrier, the sum of $14,228.00 in 1977 and his earnings from a part time job that he was working at the time of the court hearing, June, 1978, and in his questioning of Claimant, the Claimant testified further:

"Q. What kind of work did you try?

A. I triad working in automotive repair, a garage.

Q. Name?

A. Independent Auto, they are in Pelham, New Hampshire.

Q. Pelham, New Hampshire?

A. Yes, sir.

Q. what kind of work did you do there?

A. I was helping the mechanic out. I worked four days *and* I had to quit.

Q. What specifically were you doing that made you quit?

A. It consisted of helping him change different things that were wrong with a car or trying to help him change tires.

Q. Were you able to do that?

A. I tried it for four days, but I couldn't.

Q. why?

A. Because of the pain in my back.

Q. What complaints do you have now as you sit here?

A. I still have headaches, I still have a high frequency deafness in my right ear, I still have pains in my back, I still have loss of memory.

Q. Anything else?

A. I have photophobia, which is the sun bothers my eyes.

Q. Now, the pain in your back, does that change from time to time depending on what you are doing?

A. Yes, it does.

Q. How?

A. If I were to do strenuous work, it increases the pain. In fact, if I do a lot of bending or try to pick up something heavy, I can't.

Q. Do you get any pain from this job that you are now handling, pumping gas?

A. On occasion, yes. If I have to put in -- example 8 or 10 hours, ff it's really busy, then it bothers ma."

The jury awarded Claimant $163,745.47 which was satisfied on November 6, 1978.

On February 26, 1979, Claimant made request to return to work in Carrier's Signal Department, which request was rot granted. With his request, Claimant submitted a statement signed by David A. Roth, M. D., reading:

"Warren Silva is under my professional care and I feel that he is able to return to work on 1/20/79.

Restrictions: No heavy lifting."

The statement was dated January 16, 1979.

On May 30, 1979, the Vice General Chairman of the Organization submitted a continuous time claim in behalf of Claimant, starting February 26, 1979.

The record shows that no action was taken by either party with respect to the time claim filed by the representative of the Organization on May 30, 1979, until the General Chairman's letter of September 4, 1980 six months after a conference with and denial by Carrier's highest designated officer of appeals. We consider that the failure to handle the time limit issue for this length of time, brought that issue under the doctrine of equitable estoppel. In Award 15827, Referee Ives, it was held:

"... Acquiescence is conduct from which may be inferred assent. Under the doctrine of equitable estoppel a person my (sic) be precluded by his silence, when it was his duty to speak, from asserting a right which be otherwise would have had."

See also Awards 17250, 22213 and 22700.

We will also deny the claim on its merits on the doctrine of estoppel. In its submission, the Carrier cites Jones vs. Central of Georgia Ry. Co. (USDC ND CA, August 13, 1963) 48 LC Par. 18562 where the court held:

"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 to which arises because of permanent injuries, estops himself thereafter from claiming the right to future reemployment, claiming that he is now physically able to return to work;"

The Carrier also cites Scarano v. Central R. Co. of New Jersey 203 F2nd. 510 (23 LcPar. 67,540), affirming DC. Pa. 107 F. supp. 622 (22 Lc Par. 67,213); Wallace v. Southern Pac. co., 106 F. Supp. 742 (21 LC Par. 66,882); Buberl v. Southern Pac. Co. 94F. Supp. 11 (18 LC Par. 65,925). Also cited by Carrier are: Sands v. Union Pacific Railroad Co. (USDC Ore., 1956) 148 *F.* Supp. 422, 31 LC Par. 7043); Pendleton v. Southern Pacific Co. (USDC, ND Cal. 1952) 21 LC Par. 66883); Chavira v. Southern Pacific Co. (USDC ND Cal. 1960) 42 LC, Par. 16970).

The Carrier has quoted extensively from all of the court cases cited, of which the *Board* has taken note, but the quotes will not be repeated here.

The Carrier has also cited numerous Board Awards, and Public Law Board awards following the decisions of the courts. Among those cited are Award 10 of Public Law *Board* No. 1493; Awards 1 and 2 of Public Law Board No. 1716, First Division Award 20166, Second Division Awards 1672, 5511, 6129, and Third Division Award 6215. We think that Third Division Award No. 6215 accurately sums the matter up:

"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 saws or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier concession. Such would be against public policy."

The claim will be denied in its entirety.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as apprwed June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March 1982.