NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25623

THIRD DIVISION Docket Number MW-25756

John W. Gaines, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) Trackman D. R. Keller shall be returned to his position as trackman and he shall be compensated for all compensation loss suffered by him as a result of being improperly withheld from service beginning March 28, 1983 (System File C-M-1579/MG-3942).

OPINION OF BOARD: Absent the procedural technicality that arose, the kernel of the dispute is whether or not Claimant's recovery of a disability judgment on basis of his past employment with Carrier, estops Claimant from reinstatement to service with Carrier. Because of importance of the doctrine, we prefer to go into the estoppel matter, deciding on the merits and disposing of the dispute in that manner.

Estoppel is a term in common usage in the decisions. The form thereof which would apply or not to the facts of the present dispute and the sense in which used find representative definition in Third Division Award 6215 as:

> "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. Such would be against public policy."

Under present facts shown, Claimant while in the service of Carrier developed in his record a history of back injuries, culminating in an on-duty injury sustained in his back on June 13, 1979. Then throughout the following period lasting one year, the work of Claimant as trackman continued off and on, and then no more. Subsequently, having previously entered suit against Carrier in federal court, Claimant thereupon recovered a disability judgment in amount of $150,000 as returned in verdict by the federal jury.

The date of recovery of the judgment for Claimant's disabled back was February 26, 1982. On March 17, 1982, Claimant presented himself to Carrier for a physical examination, as a preliminary to his application then being tendered for reinstatement as fit to resume duties for the prior trackman assignment. There were subsequent applications to have Carrier reinstate Claimant, which Carrier from the very first has consistently declined to do.

In the court suit, two Doctors gave evidence in Claimant's cause, testifying on oral deposition that, in view of the heavy lifting work which a trackman necessarily encounters from time to time at his job, the Claimant would only get himself into trouble with his recurrent back problems. According to one of the Doctor's testimony on deposition, Claimant was medically advised not to lift more than 25 pounds, because of the Doctor's feeling all along that Claimant should not do any heavy labor. The recommendation given Claimant according to the other Doctor deposed was that Claimant not make himself a candidate for heavy industrial labor and that the recommendation was to be correctly treated as something that would be permanent; also the Doctor, whose examination revealed that Claimant had undergone prior back surgery, told Claimant that the on-the-job demands on his back are not going to allow him to function (as a trackman) in a fashion which is suitable for his employer.

The Organization and Carrier have helpfully submitted extensive quotations from cited decisions, also citations alone, and copies of complete decisions of the authorities, often identified by the dates they were handed down.

As judged from the parties' citations bearing dates we see, among the Carrier's submissions, that the latest pronouncement on estoppel is Third Division Award 23830 involving a Signalman. The Signalman, by jury verdict, recovered judgment from a Carrier in amount $163,745.47 for on-duty back injuries suffered. Less than four months later he asked to be returned fit for his original Signalman status. When the matter came before us because of the Carrier's refusal, we found more than one ground as basis to consider, but one relied upon was estoppel that we saw to be clearly appropriate. We denied the claim, in that particular Award under date of March 26, 1982.

We here hold with the decision of Award 23830 for the reasons there evident and under the accompanying extensive list of authorities as cited. We will therefore deny the claim in the present dispute.

At times, the bare size of the prior judgment becomes a factor in a determination of estoppel. Claimant has recovered a substantial sum by jury verdict, and the very amount is a matter entitled to some weight in this decision. In the example of a dispute of similar factual background, Carrier cites Public Law Board No. 1735, Award No. 1, which was dealing with a pre-trial award of $160,000 and which held:

"The size of the pre-trial settlement was of such substantial nature as to deem that it included therein Claimant's prospective loss of earning capability, with Carrier, for many years to come because of his physical impairment.

"...Accordingly, we conclude that claimant (sic) is estopped from now urging in this forum that his physical condition is inconsistent with that upon which he (sic) pre-trial settlement was based.'

In some cases, the time connection has proved a factor of note, as between when the judgment in the disability suit was rendered and when the successful party to the suit later reported asking to be deemed fit and and immediately restored to duty status. In this instance, it was nineteen days later when Claimant appeared to be medically examined and cleared by Carrier -- for full restoration to duty status; his timing is something we take cognizance of insofar as his unstable back is concerned.

And, understandably so, the relationship will perforce enter as a factor here, as between the nature of and limitations from a repeating impairment and the specific physical restrictions and requirements for the job. Claimant is being withheld from service, from resuming the strenuous labor and lifting at times necessary for a trackman; that fact is a matter which merits being given weight in view of his medical expert's caution to him not to lift more than 25 pounds.

The Organization relies upon several Awards to support its position of not being estopped. The Awards do in fact make exceptions, under their fact situations, to the general doctrine of estoppel. These exceptions can be factually distinguished in some respects, but not all and, where indistinguishable, we view their precedential value as running counter both to the great weight of authority and to this Division's approach in applying the doctrine.

Carrier objects to an alleged fatal default by Claimant due to omission of a procedurally essential, proper notification. There is perhaps a valid point to it, and we take cognizance of the objection to that extent. But it becomes unnecessary for us to make a determination, having fully considered the affirmative defense of estoppel and in that way disposing of the dispute on its merits.

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 approved June 21, 1934;

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

hat the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1985.