

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26366  
Docket Number MS-27004

John E. Cloney, Referee

PARTIES TO DISPUTE: (Kevin H. Finucane  
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

"My claim is **that** I am fully recovered and able to **fullfill** (sic) my duties as a Trouble Desk Operator and a C&S employee. Evidence to this fact has been supplied **to** the Carrier but in spite of this they have denied me my right **to** return to work. Because my rights were violated I am claiming full pay and any overtime lost since 12/10/84 and that I be allowed to return to work and exercise my seniority."

OPINION OF BOARD: After an on the job injury Claimant filed a Complaint in **the** United States **District** Court for the District of Connecticut **alleging** he received permanent injuries and had been "**incapacitated** and prevented from engaging in his employment, and he will continue to be so **incapacitated** in **the** future." A jury awarded him a verdict of \$300,000. On February 13, 1984, Claimant signed a general release upon payment of \$290,000.

On December 5, 1984, **Claimant** requested he be returned to work as fully rehabilitated and submitted a two sentence note from a Dr. Kaufman **stat-**ing he examined Claimant and "He is in excellent health and able to return to work." On January 7, 1985, he claimed all pay lost since December 10, 1984, as Carrier had not responded to his December request. On February 6, 1985, Carrier declined **the** Claim. After appeal by the Organization, the Director - Labor **Relations** declined the Claim on July 19, 1985. Rule 66(c) provides 9 months after **declination** to progress a matter to the Board.

By letter of April 2, 1986, Claimant wrote the Executive **Secretary** of the Board **requesting information** regarding how to progress his case to the **Board**. On April 8, 1986, Claimant again wrote the Executive Secretary "to **serve** notice . . . of intention to file" and reciting **to** some extent the basis of his Claim. A copy was sent to the Director - Labor **Relations**. Claimant again wrote the Executive Secretary on May 10 and 11, 1986. On May 10, 1986, he requested Oral Hearing and on May **11**, 1986, he **requested** "an extension of time in which to file my case properly."

At the Oral Hearing **Claimant argued there** was testimony at the Trial **that** he might be able **to** resume work in the future. That **testimony** plus **the** fact that the Award was for only \$300,000 to a man his age (29 years at the **time**) shows the jury did not decide he was permanently disabled.

This is not a case in which this Board should speculate as to what was in the minds of the jurors. Claimant's suit against Carrier asserted he had suffered permanent injuries and that he would continue to be incapacitated in the future. There was medical testimony at **the** Trial which would permit a jury to conclude Claimant's disability would prevent his again working for the railroad. The jury awarded a very substantial verdict.

Awards of this and other Divisions have consistently held in similar **situations** that **the estoppel** doctrine **applies**. As stated in Third Division Award 26081:

"It would be unfair now to say **that** Claimant's disability was not **finally** decided by the Jury Award or that **the** Award was not accepted, monetarily so, by the Claimant based on his permanent disability.-

As the often quoted language of Third Division Award 6215 explains:

"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."

I: is not necessary to decide the question of whether **the** matter was properly progressed to this Board.

FINDINGS: The Third **Division** of the Adjustment Board, **after** giving the parties to this dispute due notice of hearing **thereon**, and upon **the** whole record and all **the** evidence, finds and holds:

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

That the **Agreement** was not violated.

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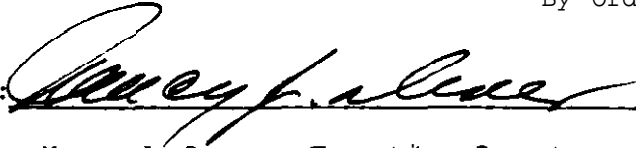
Page 3

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

A handwritten signature in dark ink, appearing to read "Nancy J. Dever", is written over a horizontal line.

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1987.