

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30818
Docket No. MW-31334
95-3-93-3-403

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier improperly withheld Mr. D. Evans from service following his medical release for service, beginning March 2, 1992, and continuing.
2. Claimant D. Evans shall be reinstated with seniority and benefits unimpaired and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 July 14, 1989, Claimant sustained a lower back injury on the job. As a consequence, Claimant sued Carrier under the Federal Employers Liability Act (FELA) and on September 30, 1991, Claimant was awarded a judgement of \$125,000. On March 2, 1992, Claimant advised Carrier that his doctor had released him to return to service. Carrier refused to return Claimant to service on the ground that Claimant's FELA recovery included an award of damages for permanent disability and, accordingly, Claimant was estopped from maintaining that he was qualified to return.

The Organization argues that Claimant did not relinquish his seniority rights as part of the FELA settlement. The Organization maintains that Carrier failed to establish that Claimant had represented himself to be totally disabled. The Organization observes that mere recovery of FELA damages does not automatically preclude an employee from returning to service. Furthermore, in the Organization's view, the amount of Claimant's recovery, particularly when reduced for payments made by the Railroad Retirement Board and by Carrier for advancements and supplemental sickness benefits, could not possibly have compensated him for permanent disability.

The Organization contends that estoppel, being an equitable remedy, is beyond the authority of this Board. Furthermore, in the Organization's view, the elements of estoppel are not present in the instant case. The Organization argues that there has been no misrepresentation of fact, there is no evidence that the court or jury relied on representations of permanent disability, and Carrier would not be prejudiced by returning Claimant to service.

Carrier contends that Claimant is estopped from denying that he is permanently disabled from performing railroad work. Carrier maintains that Claimant, his orthopedic surgeon, and his attorney all contended in the FELA action that he was permanently disabled. Carrier contends that Claimant may not, only six months after the FELA recovery, assert that he has recovered sufficiently to return to service.

The Board has reviewed the record and controlling precedents thoroughly and carefully. We disagree with the Organization's position that estoppel is beyond our authority. Rather, numerous prior Awards clearly establish this Board's authority to invoke estoppel in circumstances similar to those present in the instant case. See, e.g., Third Division Awards 29818, 29408, 28217, 24116.

During the handling on the property, Carrier asserted,

"During the trial the claimant testified that he could no longer perform the work, his doctor testified that he has permanent work restrictions and his attorney argued that he was permanently disabled as a trackman. This is all borne out in the transcript of the trial."

Carrier reiterates this position before the Board. Our review of the record leads us to agree with Carrier that the doctrine of estoppel appropriately bars Claimant's claim to be restored to service.

It is clear that Claimant sought FELA damages which included an award for permanent disability. Claimant's doctor testified to permanent work restrictions which would disqualify Claimant from performing his prior job. Claimant's attorney argued that Claimant was permanently precluded from performing Trackman's work and urged the jury to award more than \$600,000, representing the present value of Claimant's expected earnings to age 60 or 65. Carrier's attorney disputed the amount that the jury should award if it found permanent disability, arguing that Claimant should be given two years' pay to enable him to take classes or otherwise qualify for other work that he was medically capable of performing.

The analysis contained in Third Division Award 28217 applies with equal force to the instant proceeding:

"With this record it cannot be disputed that the thrust of Claimant's entire personal injury case and plea to the jury was for permanent disability. Perhaps the magic word 'permanent' was not mentioned by Claimant's attorney, but we need not rely here on any single word when the Claimant's position focused with such unalloyed clarity on the end of his employment with the railroad."

The brevity of the time period between Claimant's FELA award and his asserted ability to return to duty further calls for the application of the estoppel doctrine. See Third Division Award 29429. Finally, we are not persuaded by the Organization's argument that the size of the award indicates that the jury discounted any claim of permanent disability. As was stated in First Division Award 24116:

"[W]e are unimpressed with the Organization's assertion that the testimony given by Claimant and his expert at trial were merely opinions, or that the small size of the verdict suggests that the jury did not take into account future lost earnings. The critical issue is what the employee contended at the time of the trial, as the vast majority of Awards on this subject so indicate."

Accordingly, we conclude that the Claimant is estopped from seeking reinstatement to duty.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.