Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31184
Docket No. MW-31587
95-3-93-3-593

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

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

(1) The Agreement was violated when, on May 26, 1992, the Carrier failed and refused to allow Mr. K. Dusko to return to service following absence for disability (System Docket MW-2671).

(2) As a result of his being improperly withheld from service, Mr. K. Dusko shall be compensated for all wage loss suffered with benefits and all other rights unimpaired."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employe 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.

In 1988 and 1989, the Claimant suffered physical and mental dysfunctions from an apparent exposure to paint and paint by-products such as toluene. He could not return to work and was still under the care and treatment of physicians and psychologists in January, 1991, when he filed suit against the Carrier under the Federal Employers Liability Act (FELA) claiming he was physically and psychologically impaired to the point he could not return to work. He sought remuneration in excess of $750,000.00.

On March 22, 1991, the jury found in favor of the Carrier. Within two months of that decision, the Claimant was cleared to return to work by his personal physician. He was also medically qualified at a Baden, Pennsylvania facility by a physician who the Organization claims was a Carrier physician. He received the required MD-40 medical status report on May 14, 1992.

On May 15, 1992, the Carrier's Medical Director who was located in Philadelphia, Pennsylvania and who had not examined the Claimant, issued a second MD-40 report disqualifying the Claimant from work "pending further medical testing". By certified letter dated June 8, 1992, the Organization filed a claim protesting the Carrier's refusal to reinstate the Claimant.

Despite his request to return to work, the Claimant chose to pursue an appeal of the court's decision in his FELA suit. The Pennsylvania Court of Common Pleas rejected his appeal. In November, 1992, the Pennsylvania Superior Court sustained the decision of the lower courts. In the interim, the Organization continued to process the June 8, 1992, claim through the appeals process on the property.

The Organization contends the Claimant had a contractual right to return to work. They argue that the Carrier's refusal to reinstate the Claimant violates Rules 5, 22 and 29 of the Agreement between the Parties. Those Rules involve, "Returning to Duty After Leave of Absence, Sickness, Etc. - Exercise of Seniority", "Examinations, Physical and Other" and "Determination of Physical Fitness".

In general, those Rules provide that an employee who is returning to work after an extended leave of absence may do so after being cleared by a Carrier physician. If there is a dispute as to the employee's physical fitness, each Party will select a physician of its choice and in turn the two physicians will select a third. The panel of three doctors will then determine the employee's fitness.

According to the Organization, the doctrine of judicial estoppel is not applicable in this case. They argue that the Carrier never presented any evidence which demonstrated the existence of a civil, physical, spiritual or corporate law to support the assertion that the Claimant is estopped from pursuing reinstatement. The Organization believes it has presented extensive argument and documentation which demonstrates that the doctrine of estoppel cannot be applied in this case.

Finally, the Organization contends that even if the Carrier's estoppel argument can be considered, it was untimely raised by the Carrier.

To the contrary, the Carrier urges that this claim must fail on the basis of judicial estoppel. They claim the Claimant is estopped from taking a position that he is physically able to return to work. He testified in a previous forum, the court, that he was totally and permanently disabled from performing his job. He sought monetary reimbursement for past and future earnings. Under the doctrine of estoppel he is precluded from contradicting that testimony in another forum. The Carrier further argues that this is especially true here, where the Claimant asked to be reinstated while appealing the jury decision which denied him relief. The Carrier cites a large number of cases to support their position.

The Board has reviewed the arguments and evidence presented by the Parties. The Organization correctly argues that this Board is precluded from considering arguments and evidence not presented on Company property. However, it appears that the Carrier's arguments relative to judicial estoppel were properly raised, albeit, for the first time at the highest Company appeals level. Furthermore, we do not believe the Claimant was prejudiced in any way by the Carrier's failure to raise the issue earlier. The Organization and the Claimant had sufficient time to prepare their position on judicial estoppel, as evidenced by their compelling arguments and the large number of citations provided to this Board.

As far as the issue of estoppel is concerned, this Board has held in the past that judicial estoppel is applicable if certain criteria are present. First, the employee must have raised a claim of total and permanent disability in the previous forum. The Court must have relied on this testimony to award the employee a sufficient monetary settlement. Also considered is the time which has lapsed from when the Claimant contends in court he is permanently disabled to when he requests reinstatement. These are factors which have been considered in a myriad of cases before this Division and others. These elements were thoughtfully discussed in Third Division Award 28217. Within the Award itself the Board cited the Court case of Barnard Morawa v. Consolidated Rail Corporation and The Brotherhood of Maintenance of Way Employes(#84 - CV - 05194 - DT, 5/30/86) as follows:

> "The first issue before this Court is whether the doctrine of judicial estoppel should be applied in a subsequent proceeding when a party has previously asserted an inconsistent position in a previous litigation. The doctrine of judicial estoppel is

> designed to protect the integrity of the judicial process. . .The doctrine applies to a party who has successfully asserted a position in a prior proceeding and estops that person from asserting an inconsistent position in a subsequent proceeding. . .As the Supreme Court stated, "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position (emphasis added), he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Reliance on an employee's claim of permanent disability which results in a jury's decision of a monetary award to compensate for future loss of earnings, as well as, the time lapse between the decision and the request for reinstatement is also discussed in Third Division Award 29429:

> "In this case, all three factors support the application of the doctrine of estoppel. First, the jury clearly awarded the Claimant money to compensate him for future wage loss. Second, the award of $175,000 for loss of earnings suggests the jury intended to compensate the Claimant for his permanent inability to work during his years of eligibility. Finally, only four months elapsed between the jury verdict and the Claimant's request for reinstatement. The jury rendered its verdict in November 1989, and the Claimant requested reinstatement in March 1990. (See also Third Division Award No. 6215, P. 6, Third Division Award No. 29662, pp 2 and 3, Public Law Board No. 4746, Award No. 27)."

In reviewing the contrary position presented by the Carrier, it is apparent to this Board that the cases cited by the Carrier are not persuasive. Many of the arbitral awards cite the case of Scarano v. Central R. Co. of New Jersey, 203 F.2nd 510 (3rd Cir. 1953) as the appropriate standard in determining whether an employee is estopped from seeking redress through a second forum. Scarano held:

> "(A) plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would

> most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts will not tolerate." (emphasis added)

Even Scarano appears to require that some form of relief be awarded in the initial forum before the doctrine of estoppel can be applicable. Likewise in other cases cited by the Carrier in support of its estoppel argument, some form of relief was granted. (See Third Division Award 29818; SBA No. 1049 Award 46; Lewandowski v. National Railroad Passenger Corp.; PLB No. 4410 Award 208; PLB No. 3304 Award 224; PLB No. 4410 Award 30; SBA 1049 Award 46; PLB No. 4291, Award 4, and Second Division Award 12098.) Furthermore, Scarano makes reference to presenting an appeal in the same forum, which was not the case here.

Clearly, in the case presently before this Board, the FELA suit did not result in any type of monetary award. It is also apparent that the Claimant's doctor was not prepared to assert in the initial hearing that the Claimant was totally and permanently disabled. In fact, he indicated he felt the Claimant had a good chance at being rehabilitated. Even though the Claimant did testify at trial that he did not believe he could return to work, it could be argued he was merely stating an opinion not based on fact.(See supporting argument in First Division Award 19276) In any event, it is clear the jury did not rely upon the testimony of the Claimant to issue a favorable ruling.

The Carrier was justifiably concerned when the Claimant requested reinstatement and obtained medical clearance while simultaneously pursuing the appeal of the FELA lower court decision. It is difficult to fathom that an individual could contend, even with the concurrence of two physicians, that he was medically able to return to work while he seemingly continued to assert in court that he was permanently disabled. Under the circumstances, it did not seem unreasonable for the Carrier to demand a second medical requalification, particularly since the request was concurrent with this contradiction. The Claimant was not entitled to have it both ways.

It is also clear the claim was being processed on Company property when the Claimant's FELA suit was conclusively rejected by the Pennsylvania Superior Court. Certainly by February 3, 1993, the Company knew the court apparently rejected Claimant's arguments relative to his disability. It was at that time they should have provided him the opportunity to be requalified for his position based on the applicable provisions of the Agreement. When they failed to do so, they violated the Claimant's contractual rights.

Therefore, the Board directs that the Claimant be given the opportunity to be requalified for his position. If he is medically qualified, he is to be returned to his position, with seniority unimpaired. Furthermore, if he is medically qualified, he is to be reimbursed all wages and other benefits lost from February 3, 1993 to the date of his reinstatement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.