Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32046
Docket No. MW-31886
97-3-94-3-189

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly withheld Mr. D. Sandifer from service following his medical release for service beginning November 16, 1992 and continuing (Carrier's File 930206 MPR).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated with seniority, vacation and all other rights 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 were given due notice of hearing thereon.

Mr. D. Sandifer, the Claimant in this dispute was employed by the Union Pacific Railroad Company (former Missouri Pacific Railroad) and held seniority as a Truck Driver.

On October 24, 1989, the Claimant experienced an on-duty injury to his back. The Claimant filled out a personal injury report and went on a medical leave of absence. While on leave of absence, the Claimant received medical treatment for his injury. On July 27, 1990, the Claimant underwent back surgery. Following the surgery, the Claimant continued to receive medical treatment.

While still receiving medical treatment, the Claimant filed a lawsuit against the Carrier under the Federal Employer's Liability Act (FELA).

The lawsuit was adjudicated and on January 21, 1991, a declaratory judgement was rendered by the Court wherein the Court found that the Carrier was not negligible for the Claimant's accident.

The Claimant continued his rehabilitation under the care of his physician, Dr. David K. Selby, until October 26, 1992, when he was released by Dr. Selby to return to work with no restrictions. The Claimant reported to the Superintendent's office in Fort Worth, Texas, on October 26, 1992, and requested that he be permitted to return to work.

Superintendent Jerry Heavin advised the Claimant by letter dated November 5, 1992, as follows:

> "This has reference to the unrestricted return to work release dated October 26, 1992 from Dr. David K. Selby, which you brought by the office on October 26, 1992.
>
> According to our Labor Relations Department, you are medically estopped from returning to work on the Union Pacific Railroad."

Subsequently on January 15, 1993, the Organization's General Chairman L. W. Borden submitted a claim on behalf of the Claimant to Superintendent R. F. Stephan which read as follows:

"Dear Mr. Stephan:

Time is being claimed on behalf of Dennis Sandifer, SSN 451-23-0005, for all time lost, including overtime and holidays, that would have accrued to him had he been allowed to return to work after being on leave. Claim to begin November 16, 1992, and continue until he is reinstated with seniority, vacation and all other rights unimpaired.

Mr. Sandifer has been on medical leave since October 1989 with a broken leg and back surgery. On October 26, 1992, Dr. David Selby released him to return to work without restrictions. This release was presented to Superintendent Jerry Heavin. On November 5, 1992, a letter was received from Mr. Heavin advising that he had been medically estopped from returning to work.

We contend that rules of our agreements have been violated, especially Rule 2 and 5 of our current working agreement since Mr. Sandifer was not allowed to exercise his rights when released to return to work.

Please advise if you will allow this claim."

The claim was denied by Superintendent Stephan by letter dated March 4, 1993.

The claim was progressed by the Organization up to the highest officer of the Carrier Mr. W. E. Naro, Director of Labor Relations in a letter dated February 18, 1994, which read in part as follows:

"Further in reference to the above numbered file in behalf of Dennis Sandifer concerning claim for compensation for all time lost, including overtime and holidays that would have accrued to him had he been allowed to return to work after being on leave of absence.

Claimant, as Carrier has stated, was on medical leave of absence following an on job injury sustained in late October 1989. When he was released to return to full duty in October 1992, Carrier arbitrarily denied his return, stating:

'According to our Labor Relations Department, you are medically estopped from returning to work on the Union Pacific Railroad' (Carrier's letter of November 5, 1992)

Apparently, Carrier is contending that since Claimant made a settlement for his injury that he also agreed to forfeit his right to return to work for the Union Pacific Railroad and his seniority on the railroad which he earned by virtue of his years of service with this Railroad. Nothing could be further from the truth.

In Carrier's letter of May 19, 1993, reference is made to a sworn deposition by Dr. Shelby (should be corrected to Selby). During claims conference of June 21, 1993, at which time this case was discussed, Carrier agreed to provide a copy of the court transcript of the above deposition. However, such transcript has not been furnished and the Organization is not obligated to guess as to the full testimony of Dr. Selby, nor speculate as to the testimony in the entire transcript.

On November 20, 1990, Dr. David K. Selby gave a sworn deposition regarding Claimants' medical condition at the time. During the interim of November 1990 and October 1992, Claimant entered into a physical conditioning program in order to improve his chances of returning to work. The fact that he was released to return to unrestricted duty is proven by the 'return to work' slip dated October 26, 1992 and signed by Dr. Selby, a physician at the Dallas Spine Group, 2142 Research Row, Dallas, Texas 75235. Again in April 1993, Dr. Selby furnished another letter verifying that Claimant had been under his care and had been released to return to work.

The Claimant was medically fit to return to duty and was entitled to return in accordance with his seniority and the Carrier's defenses in this case were without basis and invalid. Claimant was on medical leave and upon release to return to full duty, Carrier was contractually obligated to return him to work. Hence, Carrier violated Rules 2 and 5 of the current Agreement, which in pertinent part, state:

'SENIORITY RIGHTS'

Rule 2. (a) Except as otherwise provided in these rules, seniority rights of employes to new positions or vacancies, or in the exercise of their seniority, will be confined to the seniority district as they are constituted on the effective date of this Agreement.

(f) Employes entitled to exercise seniority rights over junior regular assigned employes must designate exercise of such rights within twenty (20) calendar days except an employe who becomes physically disabled during the twenty calendar day period specified herein will be allowed such additional days to exercise such rights as remained in the twenty calendar day period at the time he became disabled. This extension of time in which to exercise displacement rights will be determined from a certificate of a reputable doctor (a Hospital Association staff doctor, if the Carrier so directs), which certificate will indicate the date the disability began and date of recovery sufficient to resume work and providing the disability was continuous during the interim. Otherwise, employes who fail to exercise displacement rights within the twenty (20) calendar days specified herein, shall forfeit their right to displace a regular assigned employe and shall take their place on the furloughed list with preference to work over junior employes thereon, and will be subject to assignment to bulletined positions in line with their seniority.

LEAVE OF ABSENCE; RETURN FROM LEAVE OF ABSENCE OR ABSENCE ACCOUNT SICKNESS:

Rule 5. (a) Except in case of physical disability or extreme emergency, employes will not absent themselves from duty without authority from their immediate supervisor. Employes absent account physical disability may be required to furnish a certificate of such physical disability from a

reputable doctor (a Hospital Association staff doctor if the Carrier so directs).'

Apparently, Carrier contends the Claimant was totally disabled but no evidence has been submitted to substantiate such allegation other then the previously mentioned letter of November 5, 1992. Absent any documented evidence to support Carrier's allegations, these assertions are without proof. See First Division Award 20471, Second Division Awards 1198, 3869, 4046, 4338, 4468, Third Division Awards 18056, 20217, 20573, 23296, 24574 and 28723.

The Organization strongly contends the Carrier has failed to establish that Claimant was treated fairly by being medically estopped from returning to work. We direct attention to First Division Awards 15888, 17645 and 18205."

"Therefore, the Organization has clearly shown that the doctrine of estoppel has no application to this dispute and even if it did, Carrier has failed to meet its burden of proof with respect to the three (3) necessary conditions of estoppel. Carrier has violated Rules 2 and 5 of the current working Agreement by its decision to unilaterally refuse to recognize Claimant's seniority and denying him an opportunity to return to work.

Finally, referring to Carrier letter of May 19, 1993, the quoted portions of previous Board awards (Second Division 11621, Third Division 28217 and 6215) appear to relate to claims for permanent injury cases. These Awards can have no relevance to the issue at hand as Mr. Sandifer never claimed to have permanent disability.

Carrier also questions the validity of Dr. Selby's signature because he did not sign 'M.D.' after his name. On both exhibits where Dr. Selby is referred to he is listed as David K. Selby, M.D. and his title is either before or after his name so it could be considered redundant in this instance to sign 'M.D.' again.

We respectfully request that Carrier reconsider the previous declination of this claim and allow as presented.

Thank you for the time extension granted for our further research in this instance. If Carrier is in need of additional time, the Organization will offer no objections.

Yours truly,
L. W. Borden"

The claim was declined by Mr. Naro on February 23, 1994, in the following letter to the Organization:

"Dear Sir:

This refers to the claim of Dennis P Sandifer who is medically estopped from returning to work as a result of his testimony in a trial that he was permanently restricted in ever performing work for the Railroad for the rest of his life.

In June of 1993 we conferenced this claim, and you were advised that the Carrier's position remained that Mr. Sandifer was medically estopped. In conference, you were advised that the Carrier would provide you with a copy of the transcript. Attached, you will find the transcript. Of note, is page 19 of the transcript where Dr. Selby is testifying:

Q. 'Are those work restrictions permanent in the sense of lasting the rest of his work life?

A. 'Yes'

As you are aware there have been a significant number of Awards issued by the Third on the issue of 'estoppel'. 'Estoppel', as defined in 'Webster's Third New International Dictionary' (unabridged), is 'a legal preclusion or bar by which one is prevented from alleging something he has previously denied in actuality or by implication in his action or from denying something he has similarly alleged.' Consequently, when Mr. Sandifer and his doctor argued that he was permanently restricted from working for the Railroad again in a legal proceeding, they

cannot now come back and argue that he is medically fit for duty. Some of the Awards which have recently been rendered are as follows:

THIRD DIVISION AWARD 29818
BMWE vs. UNION PACIFIC RR

'The legal principle of estoppel was properly invoked by the Carrier since it had in detrimental reliance upon the Claimant's representation of his permanent disability settled in his FELA claim. Language provided in Second Division Award 1672 is pertinent in this regard.

> "When an employee alleges permanent disability resulting from the injury and pursues *that claim to final conclusion and obtains a* judgment on that issue, he has legally established his permanent disability and the *Carrier is under no obligation to return him to* service."

* * * * * * * * * * *

Under the circumstances, the Carrier's reliance upon Claimant's representations of his physical disqualifications at the judicial proceeding are dispositive of his capability to resume work as a laborer and thus the Carrier's refusal to reinstate him was not arbitrary or capricious. The Carrier's judgment that the doctrine of estoppel has been applied to bar similar claims is supported by numerous Awards of the Board and Public Law Boards. See PLB No. 1660, Award 21; PLB No. 3001, Award 2; First Division Award 6479; Second Division Award 9921; Third Division Awards 29408, 28719, 28217 and 23830. See also Scarano v. Central Railroad of New Jersey, 203 F.2d 510.

Of particular significance is Second Division Award 11641 wherein a relatively similar dispute Second Division Award 11621 was cited as follows:

> "In that Award the Board stated that evidence and allegations presented and made before the court in order to win an award could not be nullified by Claimant at a later point simply because was to his advantage to do so. The only difference between this case and that one is that here an out-of-court settlement was made. In both cases there were pleadings of permanent injury."

Therefore, the Board will follow the Awards which hold the doctrine of estoppel applies to the merits of the dispute and deny the claim.'

In any event, in line with my previous advice, this is to advise that the claim remains declined for the above reasons and the other reasons of the Carrier advanced on the property. Failure to take issue with any other contention in your correspondence is not be considered as acquiescence on the Carrier's part.

Yours truly,
W. E. Naro"

The position of the Carrier in this dispute relies solely on their strong assertion that the Claimant is medically estopped from returning to work because of testimony of the Claimant's personal physician Dr. Selby given in a deposition taken on November 20, 1990, in connection with the F.E.L.A. lawsuit filed by the Claimant against the Carrier because of his personal injury sustained in an accident occurring on October 24, 1989. That testimony stated that the Claimant would be permanently restricted in his work activities because of his injury.

The Carrier further contends that the subsequent return to work statement of Dr. Selby dated October 26, 1992, stating that the Claimant has now recovered sufficiently to resume unrestricted work duties conflicts with his deposition statement that the

Claimant would be permanently subjected to certain work restrictions and accordingly the estoppel doctrine long recognized in the railroad industry is applicable.

The Organization's position is that the estoppel doctrine is not applicable because the circumstances differ from the numerous Awards cited by the Carrier and further that the jury in the FELA lawsuit ruled against the Claimant's contention that he was permanently disabled.

The Organization further contends that the Carrier violated the Agreement when it unilaterally removed the seniority of the Claimant.

Both parties to this dispute have submitted a number of Awards which they allege supports their respective positions.

We have researched the Awards cited by both parties and generally find that in most Awards wherein the doctrine of estoppel is applicable, monetary settlements have been made to the Plaintiff. In the instant case, there is no monetary settlement present as a result of the lawsuit filed by the Claimant. The jury found for the defendant.

In other Awards, the disputes involve lawsuits filed on the basis of permanent disability from any gainful employment.

The distinction between the Awards cited by the Carrier and the instant case clearly raises a question concerning the Carrier's position as to the applicability of the estoppel doctrine.

Additionally, the record in this case reveals that the Claimant engaged in substantial rehabilitation exercises throughout the history of the dispute. The Claimant's personal physician did not testify or state in his deposition that the Claimant was permanently disabled from all work.

The deposition statements of the Claimant's personal physician dealt with work restrictions or limitations on the duties that the Claimant could perform. Another factor to be considered is that a period of almost 22 months elapsed between the date of the deposition of Dr. Selby in the court trial and the date Dr. Selby released the Claimant to return to work. It is possible that because of the continuous rehabilitation exercises

engaged in by the Claimant during that period of time that his condition improved sufficiently to warrant a change in the evaluation of his personal physician.

It is quite clear from the record that the factual situation in this dispute is unique and does not lend itself to the application of the true intent of the doctrine of estoppel.

Accordingly, it is our opinion that this dispute can best be resolved by giving the Claimant the opportunity to submit to a medical examination by the Carrier's Chief Medical Officer to determine his physical fitness and qualifications for returning to his regular position. If he is found to be medically qualified, he should be returned to service with seniority and all other rights unimpaired but with no pay for time lost. If he is found to be not qualified to return to work, he should still retain his seniority and all other rights unimpaired under the provision of the Agreement.

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 10th day of June 1997.

Carrier Members' Dissent
to Award 32046 (Docket MW-31886)
Referee Charles J. Chamberlain

The Majority in Award 32048 erroneously found that the doctrine of estoppel did not apply to an employee who (along with his physician) had testified under oath that he would be permanently restricted in his work activities due to a work place injury. The Majority holds that this case differs in Awards cited as precedent by the Carrier in that the Claimant in this case did not file his lawsuit on the basis of permanent disability from any gainful employment and because the Claimant did not receive any monetary settlement as a result of his lawsuit.

By redefining the doctrine of estoppel, the Majority is clearly acting as a judge in equity. The Majority relies on generalizations about "most" of the awards wherein the doctrine of estoppel is applicable in order to reach its goal of what it feels is an equitable solution. The Majority opinion implies that since the Claimant did not receive any settlement monies from his FELA suit, he should be entitled to return to a job he (and his physician) swore that he would not be able to perform. The Majority is overlooking an important legal doctrine which is well-recognized and supported.

While it is fortunate for the Claimant that he has recovered far from what it was attested he would be able to, it is not within the authority of this Board to make judgments of equity. Furthermore, it is unseemly for this Board to reward the misrepresentations made under oath as to the Claimant's ability to return to his former job.

We dissent.

Martin W. Fingerhut

Paul V. Varga

Michael C. Lesnik