Award No. 9229
Docket No. CL-11121

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

NEW YORK CENTRAL RAILROAD, NEW YORK AND EASTERN DISTRICT (except Boston and Albany Division)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, New York Central Railroad, Eastern District (except Boston Division):

1 — That Carrier acted arbitrarily and in violation of the Agreement when it removed the name and seniority dating of Arthur Yaguda, from the Class 2 seniority roster of the Clerks, Mohawk Division, Transportation Department.

2 — That Carrier acted arbitrarily and in contravention of the Agreement when it failed to hold a formal investigation and/or hearing in accordance with Rule 22 of the Clerks' Agreement.

3 — That Arthur Yaguda be paid for each work day at the rate of Baggage and Mail Trucker from September 24, 1957 until such time as he is permitted to work with duties suitable to his physical condition.

EMPLOYES' STATEMENT OF FACTS: While employed as Baggage and Mail Trucker in Passenger Station, Albany, N.Y., on September 21, 1955, Mr. Arthur Yaguda was engaged in the unloading of United States Mail from a baggage car, which had four baggage trucks backed against it, the train moved without warning and he fell between the trucks and was pinned under one of the trucks which had been set in motion by the moving train.

Because of this injury Mr. Yaguda was hospitalized for a time, treated by Railroad doctors and by other doctors engaged by him, and up to September 24, 1957 was unable to work. By action of the Carrier he has not been permitted to work following his request of September 24, 1957.

Settlement could not be accomplished with representatives of the Carrier for damages which would compensate him for medical expense incurred and

"The rules of construction applicable to a collective agreement rest on no different basis than those of any other employment contract. A party to an agreement has a legal right to breach its terms, but in so doing, subjects himself to damages resulting from the breach. In the absence of agreement, the measure of damages for breach of an employment agreement is the difference in the amount earned during the period of the breach and the amount that would have been earned but for such breach. This is a general rule of law which applies in every instance when the contract makes no reference to the subject. One who seeks damages for a breach of an employment agreement is obliged to mitigate such damage by using reasonable diligence in seeking other employment in the territory where he was employed. He may not sit idly by with impunity and create or accelerate damages to his own advantage. His earnings so made are deductible from the amount he would have made but for the breach in determining the amount of damages he is entitled to receive from the party committing the breach of contract. These are time honored principles of employment contract law which have been applied by courts generally. Their logic is unassailable from the standpoint of justice and right, and must be assumed to have been contemplated by the parties when they elected to make no reference to the subject in the controlling agreement here involved. If we are to have order and consistency, this Board must give effect to these principles until such time as they may be changed by voluntary agreement or the methods provided by the Railway Labor Act.

"Claimant is therefore entitled to recover the amount he would have received as wages had the contract been performed from July 12, 1950 to December 19, 1950, less what he earned in other employment during that period, or what he might by reasonable diligence have earned in other employment during such period."

CONCLUSION: The record shows that claimant proved before the Court, with competent medical testimony, that he was totally and permanently disabled; that Mr. Yaguda's name was properly dropped from the seniority roster; that under no circumstances should the monetary portion of this claim receive favorable consideration; and that precedents established by this and other tribunals support the action of the Carrier. Therefore, Carrier urges this Board to find that the claim is without merit and that it be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: On September 21, 1955, Claimant, a baggage and mail trucker at the Carrier's Albany Passenger Station, was injured during the course of his employment. Thereafter, he brought suit against the Carrier under the Federal Employers' Liability Act in the United States District Court for the Northern District of New York to recover $250,000 for his injuries. Upon trial of the action and on May 15, 1957, the jury returned a verdict of $35,000 in favor of the Claimant. The judgment thereon less the amount of Railroad Retirement Lien was paid by the Carrier on June 19, 1957.

On September 24, 1957, Claimant reported to the Carrier's Baggage Agent to return to service and was informed that he had been removed from and his name taken off the seniority roster as of May 27, 1957. The record

shows that the Superintendent's letter dated May 29, 1957 to the Baggage Agent advised that Claimant's name was being removed from the seniority roster and that "this man's physical condition is such that he is permanently disabled from resuming his regular work on the Railroad, and he is not to be reemployed." Claim for reinstatement to service and reimbursement for wage loss was filed on September 25, 1957.

In support of its claim, the Brotherhood, in substance, contends that the removal of Claimant's name from the seniority roster under the circumstances shown by the record constituted dismissal of Claimant without a hearing in violation of paragraph (a) of Rule 22 of the applicable Agreement, and that the refusal of Claimant's request to return to service denied him the benefits of Rule 42 of the Agreement.

Paragraph (a) of Rule 22 referred to reads:

> "No employe shall be disciplined or dismissed without a hearing, but may be held out of service pending such hearing, which shall be prompt. At a reasonable time prior to the hearing, he shall be apprised of the charge against him and given opportunity to secure the presence of necessary witnesses."

Aforementioned Rule 42 states:

> "Efforts will be made to furnish employement suited to their capacity and at rates of pay established for such positions, to employes who have become physically unable to continue in service in their present positions."

The Carrier, in substance, contends that paragraph (a) of Rule 22 is not applicable because Claimant was dropped from service on account of his total and permanent disability, and that the verdict of the jury in the court action brought by Claimant estops him from asserting his physical fitness to return to service and warranted his removal from employment.

The doctrine of estoppel relied on by the Carrier is bottomed on the concept that where it can reasonably be concluded from the record in the court action that the jury's verdict is an award of damages for total and permanent disability, payment of the judgment entered on such verdict constitutes payment of compensation for such loss of earning capacity. (See Awards 6740, 6215, 1672.) This basis for the estoppel principle was explained in the much cited case of **Scarano v. Central R. of New Jersey** by the District Court and, on affirmance on appeal, by the Court of Appeals, Third Circuit. The District Court (107 F. Supp. 622, 623) said:

> "A reading of the record in Civil Action No. 9623 can leave no doubt in the mind of any reasonable person that the jury's verdict was based substantially on future loss of earning capacity. The medical expert of the plaintiff . . . testified that in his opinion Scarano was permanently and totally disabled . . . When the amount of the verdict . . . is considered in light of plaintiff's yearly earning capacity . . . it is abundantly clear that the Railroad by its payment has compensated the plaintiff substantially for a permanent or protracted loss of earning capacity."

The Court of Appeals (203 F. 2nd 510, 513) said:

"At the same time, in the nature of the problem, it has been rightly pointed out by the Court of Appeals for the District of Columbia that in applying this rationalization 'each case must be decided upon its own particular facts and circumstances.' Galt v. Phoenix Indemnity Co., 1941, 74 App. D.C. 156, 120 F. 2d 723, 726. The particular facts and circumstances we rely on are these. Plaintiff asserted in a judicial proceeding and introduced evidence tending to prove, that he was not able and would not be able to work. He claimed damages for this lost ability to earn wages. As a result of that claim, and by the aid of that judicial proceeding, plaintiff obtained from defendant a sum of money which by its size considering plaintiff's age and earning record, indicates that it was intended to compensate him for his loss of ability to earn wages for at least a substantial future period."

These decisions establish that the estoppel doctrine has been applied where it can reasonably be said on the basis of the record of the court action that the jury's verdict and payment of the judgment entered thereon represent compensation for alleged total permanent disability obtained by the plaintiff by means of the judicial proceeding.

The difficulty with applying these principles in this case is that from the record before it, this Board cannot reasonably conclude that the jury's verdict in favor of Claimant was to compensate him for total permanent disability. While the record shows allegations by Claimant in the court action tantamount to claiming such disability and that medical testimony presented by him in court was to similar effect, the record also shows that the same medical testimony also informed the jury that Claimant suffered less than total disability. The Carrier's Submission summarizes the Claimant's medical testimony in the court action, in part, as follows (Record, pages 33-34):

"The trial resumed at 10:00 A. M., May 9, 1957. Dr. Joseph Steinbach was called by the plaintiff. He had been Mr. Yaguda's physician since 1951 when he began treating Mr. Yaguda for diabetes. Dr. Steinbach' (sic) diagnosis was coronary disease, diabetes and low back strain. He testified that the accident was a competent producing cause of this man's heart condition and of his back condition and that he always would have **partial permanent disability and would never again be able to do work requiring lifting, but could perform only desk work in the future.** * * * On May 10, 1957, Dr. Bucci was called by the plaintiff. He testified that Mr. Yaguda should not do any work **requiring lifting, such as was required on his railroad job.**" (Emphasis supplied.)

In this posture of the record here, it would be pure speculation for this Board to conclude that the jury in reaching its verdict completely ignored the medical testimony referred to in the above quotation from the Carrier's Submission and based its verdict entirely on the assertions of total permanent disability.

On the basis of the conclusions stated above, the Board must find that the record does not support removal of Claimant's name from the seniority roster for the reasons relied on by the Carrier and that he was not subject to dismissal without a hearing as provided in Rule 22.

Concededly, paragraph 3 of the Statement of Claim was asserted as "a penalty for the Agreement violation." No basis for the imposition of

such penalty has been shown. Nor does the record show Claimant's physical condition as of the time he sought to return to service or what duties he claims his physical condition would have permitted him to perform.

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

That the parties to this dispute 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

That the Agreement was violated.

AWARD

Paragraphs 1 and 2 of the Claim are sustained.

Paragraph 3 of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Secretary

Dated at Chicago, Illinois, this 11th day of February, 1960.

DISSENT TO AWARD NO. 9229, DOCKET NO. CL-11121

Award 9229, by speculation and conjecture, concludes that the jury, in reaching its verdict in court, took into consideration medical testimony which, while conceding that Claimant could not perform work such as was required on his railroad job, alleged that he could perform desk work. In reaching its conclusion on this basis, the majority exceeded its authority because this Board does not indulge in speculation and conjecture to decide cases (Awards 6647, 6673).

Furthermore, a legion of our awards hold that discipline rules are not applicable in cases of this kind.

The record shows that Petitioner itself herein admitted as follows:

> "Historically a man's seniority on the Railroad is something held sacred — and he may not be deprived of it unless he * * * on his own application, indicates total disability. * * *."

Accordingly, the sole question to be decided herein was whether or not, on his own application, Claimant has indicated total disability. The record is replete with medical and other evidence that Claimant did so indicate, including the following statement:

"3. Plaintiff has been prevented from working from the 21st day of September, 1955 to date and verily believes that he will be unable to be gainfully employed for the rest of his life."

For the foregoing reasons, among others, Award 9229 is in error and we dissent.

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. F. Mullen

ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9229, DOCKET NO. CL-11121

The crux of the decision in this Award is contained in the following paragraph:

"* * *, the Board must find that the record does not support removal of claimants' name from the seniority roster for the reasons relied on by the Carrier and that he was not subject to dismissal without a hearing as provided in Rule 22."

Rule 22(a) specifically provides that "no employe shall be disciplined or dismissed without a hearing."

The record in this dispute clearly makes it evident that Claimant was summarily dismissed without a hearing for exercising his civil rights in filing a lawsuit to recover damages against the Carrier for an on duty injury, with the knowledge that it could not prove "just cause" for dismissal had a hearing been held.

This conclusion is supported by Third Division Award No. 1829, where Referee Yeager ruled:

"The Carrier has, under the rules, the right to dismiss employes for cause, but the bringing of legal action against it is not cause within the meaning of the rules, and if it were it could not be upheld. Such a holding would go counter to numerous decisions of this and other Divisions of the National Railroad Adjustment Board and, as pointed out in some of the decisions, thus would be against public policy."

Having failed to sustain its position that an employe could be discharged for bringing suit against Carrier for damages resulting from an on duty injury, Carrier's attorneys came up with the ingenious theory that an employe's arbitrary discharge could be defended on the plea that he was estopped from returning to service after pleading that he was permanently disabled to perform such service in a lawsuit. The plea of estoppel is a doctrine of equity that is inadmissible and cannot be considered by the National Railroad Adjustment Board in its deliberations in settling disputes that may be referred to it by petition of either party under the Railway Labor Act.

The equitable doctrine of estoppel may be considered and applied under very restrictive circumstances by a court of competent jurisdiction, i.e., Courts of equity. It is not necessary that the doctrine be explained as to its proper application here, as it has no bearing upon the disputes that come before us.

It is unfortunate that some referees have allowed themselves to be mislead and applied this equitable doctrine in a few cases on the First, Second and Third Divisions and thereby sanctioned the Carriers arbitrary dismissal of an employe without just cause and due process. However, many awards of these Divisions, while considering the doctrine, as here, have correctly rejected its application and held that the employes' rights have been abrogated. See First Division Awards 15888, 16482, 16911, 17157, 17454, 17459, 17462, 17500, 17645, 17355, 18205, 18227, 18466, 18486, 19112, 19156, 19276, 19286, 19287, 19288; Second Division Awards 2100, 2500 and Third Division Awards 1829 supra, 7411, 8067.

Referee Roberts in First Division Award 19287, involving the issue of estoppel, in part stated:

> "It has been said, and properly so, in many of the awards of this Board that our consideration of a case must be limited to the rules of the Agreement and their application to the facts in the case as presented in the docket; * * *."

He also overruled the contention that res judicata and collateral estoppel applied to a proceeding before the Board, by saying:

> "Let us keep in mind that when an employe brings a cause of action against a carrier he does so under the Federal Employee's Liability Act and the parties to that cause of action are the employe and the carrier. When a claim is presented to this Board it is under the Railway Labor Act and the parties to the claim are the petitioner (the union) and the carrier. Therefore, the parties in the case before us are not the same as the parties in the court case."

It should also be remembered that the National Railroad Adjustment Board, while a creature of law, is not a court of record and Congress never intended it as such; that if the rules of evidence, pleadings, and other legal precepts were to govern in disputes referred to it, the courts provide a proper forum and no need for this Agency exists. Third Division Award 7350.

The Supreme Court in Slocum v. D.L.&W., 339 U.S. 239, 70 S. Ct. 577, ruled that no court — state as well as federal — had any power to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act. That a court in handling a proper case coming under its jurisdiction, which made it necessary to consider some provision of a collective-bargaining agreement, "its interpretation would of course have no binding effect on future interpretations by the Board" and, "we hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

Consequently, the equitable doctrines and legal precepts, that may be determinative of a dispute before a court of competent jurisdiction, have no application here.

Therefore, the only question at issue was whether Claimant had been arbitrarily dismissed without a hearing. The record is clear on this question and it was not necessary to "speculate" in regards thereto. The Board would have exceeded its authority had it denied the claim on the basis of Carrier's equitable plea of estoppel, regardless of the absurd contentions made in the first paragraph of the Dissent.

The desperate attempt to bolster their argument from an excerpt from Petitioner's brief, clearly shows the weakness of their position. Anyone familiar with railroad collective bargaining agreements would immediately recognize the term "application" as that which is consdered in Rule 21, which refers to the application made by new employes when hired by the Carrier. The Rule provides:

> "The application of new employes shall be approved or disapproved within 60 days after the applicant begins work."

Nowhere in the record was it even contended that Claimant's application for employment showed he was "totally disabled". Therefore, the dissenters have proven the erroneousness of their conclusions by their own contentions.

The sole issue was whether the Claimant was arbitrarily dismissed without a hearing and his physical condition had no relevancy to that question. The statement allegedly made by Claimant related to the complaint and evidence presented at the court proceedings by claimant's attorney and physician. It should also be remembered that Carrier also presented testimony at the trial that Claimant was not totally disabled in an endeavor to reduce the damages for the on duty injury. Even if we were permitted to consider equipt in our deliberations on the Board, we would be forced to rule against the Carrier on the well established maxim that "He who seeks equity, must do so with clean hands."

That the Board is not authorized to consider equity in disposing of disputes, is fully recognized by the Dissenters in their dissent to Award 9193, Docket CL-8754, wherein they state:

> "While it readily appears that equity considerations troubled the Majority and strongly influenced its decision in this instance, this Board should have confined itself to interpreting the Agreement Rules as written; equity is not a proper subject for consideration by this Board."

J. B. Haines
Labor Member