

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26366
Docket Number MS-27004

John E. Cloney, Referee

(Kevin H. Finucane

PARTIES TO DISPUTE: (

(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 stating 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."

It 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 Employees involved in this dispute are respectively Carrier and Employees 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

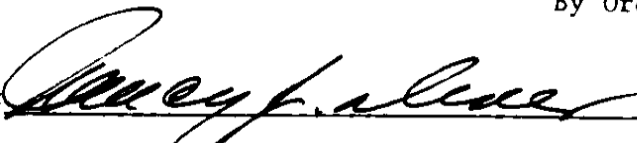
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

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