

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: (Luther Johnson  
(  
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"NEC-BRAC-SD-520 Luther Johnson

Carrier's refusal to allow Luther Johnson to exercise his seniority and return to work."

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 employes involved in this dispute are respectively carrier and employes 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.

As Third Party In Interest, the Brotherhood of Railway, Airline and Steamship Clerks was advised of the pendency of this dispute and filed a Submission with the Division.

The basic facts in this case are set forth as follows:

On October 14, 1976, Claimant suffered an on-the-job injury while employed as a Baggage man, at Penn Station, New York. He subsequently filed a complaint in United States District Court, Southern District of New York on February 7, 1977, wherein he alleged that as a result of such injury he became "sick, sore, lame and disabled; suffered severe and serious injuries to his head, body, and limbs; severe shock to his nerves and nervous system and [believed that said injuries would] be permanent in effect." Claimant returned to work on February 21, 1978, and later suffered two additional injuries on March 22, 1978, and July 17, 1979, respectively. On July 23, 1979, Claimant was medically examined by a Carrier physician and found able to work; but on August 1, 1979, he was placed on an indefinite medical leave of

absence upon the advice of his personal physician. On February 25, 1981, some eighteen (18) months later, Claimant's case was heard in the aforesaid District Court, at which time Claimant and his medical experts testified as to the permanency of his disability. The jury returned a verdict favorable to the Claimant and awarded him a judgement of \$220,000. Approximately twenty (20) months later on October 12, 1982, Claimant reported to the Carrier's General Supervisor/Commissary, Penn Station, New York, with a note from his personal physician attesting that he was able to return to duty. He was not permitted to do so based upon the monetary judgement and his physician's court testimony that he was permanently disabled. No Claim was filed in connection with Carrier's refusal. In his petition to the Board Claimant asserted that he secured a more detailed medical note from his physician on October 13, 1982, which in essence supposedly affirmed that his treatment was conservative and, accordingly, he was able to return to work the next day. Claimant stated that notwithstanding this more detailed explanation, Amtrak's Commissary Supervisor denied him the opportunity to exercise his seniority. Claimant's name was still carried on a Seniority Roster with a seniority date of July 8, 1974. Between October 13, 1982 and April 5, 1983, BRAC's Division Chairman discussed the matter with the District Manager of Labor Relations and requested on the latter date that a Medical Board be convened to ascertain Claimant's actual physical condition. This request was refused and according to Claimant, he believed that up until January 14, 1985, when a formal grievance was filed, his "grievance" was being timely handled. In his petition, he contended that he had reported contact with various officers of BRAC and Amtrak concerning his "grievance," but noted that he did not possess documentation as to what transpired between Carrier's refusal to establish a Medical Board and January 14, 1985. In this connection, the record shows that by letter dated May 4, 1983, Carrier denied the BRAC Division Chairman's request and also pointed out that Claimant was not removed from service by a Carrier physician within the meaning of Rule 8-D-1. This Rule, in part, reads:

"(a) When an employee has been removed from service account of an examination made by a Corporation physician, the employee may request, individually or through his Division Chairman, that the question of his physical fitness to continue in his present occupation be finally decided before he is permanently removed therefrom."

On this point, it was Carrier's position that said rule was inapplicable to Claimant's situation.

By letter dated September 11, 1984, Claimant wrote to the District Manager of Labor Relations requesting permission to report for service. He enclosed a note from his personal physician dated August 8, 1984, which stated that he was able to return to work. By letter dated October 8, 1984, the District Manager of Labor Relations denied the request on the basis that Claimant was awarded a monetary judgement in a court of law predicated on the fact that he was permanently disabled. This letter read, in part,

"We have reviewed the documents enclosed with your letter concerning the judgement entered against Amtrak in connection with the permanent disability you incurred as a result of an on-the-job injury. It is our understanding that the judgement was rendered in your favor based on the testimony in court of both you and your physician attesting to the permanency of your disability.

In view of the Court's decision we are unable to permit you to return to duty."

A formal claim was filed by the Vice General Chairman on January 14, 1985, asserting Agreement violations when Carrier refused to allow Claimant to exercise his seniority. He charged that Rules 1, 2-A-7, 2-B-1, 5-D-1 and 8-D-1 were violated. The Commissary Supervisor denied the claim under date of March 15, 1985. Upon appeal to the District Manager Labor Relations, the Claim was assigned File Number NYP-BRAC-25/0585, handled in conference on May 9, 1985 and denied by letter dated July 5, 1985 wherein Carrier tendered a comprehensive written denial and detailed a response to each of the cited rule violations. It noted at the outset that the Claim was procedurally defective, since the presentation of a Claim was made on January 14, 1985, well beyond the prescribed time limits of Rule 7-B-1 (a). It used its October 8, 1984, denial letter to Claimant as the date to toll the occurrence of the asserted Claim. By letter dated July 17, 1985, BRAC's General Chairman apprised Claimant that the Organization would not further handle the Claim and set forth the Organization's reasons for such action. The Organization also advised that it had no objection if Claimant's attorney progressed the Claim. The pertinent parts of this letter are reproduced as follows:

"We have been progressing your grievance in accordance with the Railway Labor Act and the collective bargaining agreement. Simultaneous therewith we have been investigating the underlying merits of your claim both with regard to the facts, your previous testimony, and those arbitration cases that have been decided which involved facts similar to those you have raised. On the latter, we are attaching copies of Second Division Award 7976, Third Division Awards 23830, 22598 and 13524 for your convenience. They hold that an employee such as yourself who prevails on an FELA claim wherein permanent disability was claimed and recovered upon cannot claim re-employment on the ground that he is no longer disabled.

We have learned that your physician's testimony used at trial was to the effect that you were permanently disabled. You also testified that you were disabled. Moreover, your attorney in summation claimed you were entitled to recover \$15,000 per year for 30 years. The jury rendered a \$220,000 verdict. In light

of these and other facts regarding your claim and the clear weight of arbitral authority against your position, we have concluded that your claim lacks merit and cannot be successfully progressed to arbitration. We have therefore concluded to decline further handling of your claim.

We also note that your attorney unsuccessfully sought in federal court to enjoin BRAC from the further handling of this claim on your behalf and from having further contact with you. However, your attorney has been advised that BRAC has no objection to his progressing your Claim to arbitration on your behalf."

It was Claimant's position that based upon Carrier's contention that the Claim was procedurally defective, namely, that the instant Claim was untimely filed, the Board must first decide whether or not BRAC timely handled his Claim, to exercise his seniority, under the time limit provisions of the Agreement. He also argued that the legal doctrine of estoppel, as defined in Scarano v. Central RR of New Jersey (203 F2d 510) was inapplicable herein. (First Division Awards 17454, 17459, 17462, 17500, 17645, 18205, 18486, 18532, 19276, 19287, 19288, 19374 and 19595 were cited as on point).

In defense of its actions, Carrier argued that the Claim was untimely filed and thus procedurally defective, and without standing on its merits, in view of the legion of Awards fully supporting its position. In effect, Carrier maintained that once an employee had established in a court of law that he was permanently disabled and received a judgement for future wage losses based on such assertions, the employee was estopped from later contending that he was able to return to work. It cited several federal court decisions to affirm its point, including the Scarano case previously noted. In Scarano, the U.S. Court of Appeals held in part that:

"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 early contentions. Such use of inconsistent positions would most flagrantly exemplify that playing fast and loose with the courts which has been emphasized as an end the courts should not tolerate."

See also Jones v. Central of Georgia, (331 F. 2d 649) Wallace v. Southern Pacific Company (106 F. Supp. 742,) and Buberl v. Southern Pacific Company (94 F. Supp 11). In addition, numerous National Railroad Adjustment Board and Public Law Board Awards were referenced to underscore the application of estoppel herein. See Second Division Awards 1672, 7976, 8727; Third Division Awards 6215, 13524, 22598 and Award No. 1 Public Law Board No. 1735 and Award No. 9 Public Law Board No. 3530, et al.)

In considering this case we disagree with Carrier's position that the Claim filed on January 14, 1985, was procedurally defective. Based on a careful reading and a painstaking reconstruction of the parties chronological interactions, especially, since October 12, 1982, we cannot conclude that Carrier's letter of October 8, 1984, singularly established the occurrence of a one time grievable event. Rather and based upon observable historical developments, we find that said interactions over an extended period of time were more in the nature of an on-going inquiry for employment reinstatement. If anything, a de facto continuing Claim was present. Consequently, we are constrained by these factors to find the Claim procedurally valid. It would defeat the manifest purposes of the Agreement's grievance resolution machinery under these circumstances to find otherwise.

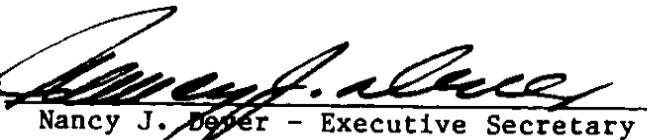
As to the merits of the Claim and consistent with our determinations in analogous type cases, we must flatly deny the Claim on the grounds of estoppel. Claimant was awarded a monetary judgement of considerable value on the basis that he was permanently disabled and it was this medical contention affirmed by expert opinion that persuaded a jury to find in his favor. In a recent case, involving the same Carrier and a similar type Claim, we applied the doctrine of estoppel to deny the Claim. In the case at bar we find no distinction to warrant a diametric conclusion. In that case, an employee was awarded \$300,000 for permanent injuries and later sought job reinstatement based upon a physician's note that he was able to return to service. In denying that Claim, we pointedly stated that the trial jury was convinced that the employee's disability would prevent his working again for the railroad, which was essentially the implicit conclusion of the jury which awarded Claimant herein \$220,000 in 1981. (See Third Division Award 26366 for details). We also referenced in that decision, Third Division Award 26081, wherein we stated: "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." Upon the record and for the reasons aforesaid, we are compelled to deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest

  
Nancy J. Deper - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1988.