

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 28719  
Docket No. SG-29052  
91-3-89-3-483

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen  
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Pacific Transportation Company (SPTC [EL]):

'Claim on behalf of A. Lyons, for right to return to service, account of the Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 408, when it refused to allow him to return to work as he had requested.' Carrier file 476-57-A."

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 waived right of appearance at hearing thereon.

On August 29, 1988, three days following a judgment awarding Claimant damages in the amount of \$168,750.00 as the result of a F.E.L.A. suit, the Claimant informed Carrier through his attorney that he wished to exercise his displacement rights on a job at the System Signal Shop in Houston, Texas.

By letter dated October 11, 1988, the Carrier's Superintendent responded, denying the request. He noted that "...as a result of the verdict ... [the Claimant] is no longer eligible to exercise these displacement rights. It is the position of Southern Pacific that the award of significant future lost wages estops [the Claimant] from eligibility for a return to duty."

The Organization argues that at no time did Claimant contend in court that he was totally and permanently disabled. Further, Carrier has returned disabled employees to work in the past and Claimant has sufficient seniority to displace in the Houston Signal Shop. The Organization believes that Carrier's refusal constitutes a violation of Rule 408 of the Agreement (Abolishment and Force Reductions).

This Board has reviewed the full record of this case, including the U. S. District Court's final judgment entered on December 28, 1988. We note that included in the award were damages for the loss of future earnings in the amount of \$225,000. (This amount, as well as the initial overall award of \$337,000, was subsequently reduced by 50 percent due to Claimant's negligence in regard to his injury.) It is clear to this Board that Claimant's attorney had made a convincing argument to the court in regard to Claimant's inability to resume his employment with Carrier in the future.

This Board has held in a prior seminal Award (Third Division Award 6215), that employees who have gained a benefit in one forum by arguing that they are incapable of work are estopped from seeking a further benefit in a second forum by contending just the contrary:

"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 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."

This principle applies to this case and the Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bixby - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.