

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier terminated the seniority and employment relationship of Mr. R. M. Balestino within a letter dated July 13, 1989 without the benefit of a fair and impartial hearing as required by Rule 27, Section 1(a) (System Docket MW-704).

(2) Mr. R. M. Balestino shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage and benefit loss suffered as a consequence of the violation in Part (1) above."

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 employees 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 November 11, 1986, Claimant sustained an on-duty injury while working at Chester, Pennsylvania. In connection with that incident, he filed a suit against Carrier pursuant to the Federal Employers' Liability Act (FELA). Following litigation, the jury returned an initial verdict awarding Claimant \$210,000 for permanent disability to perform Trackman's work. The monetary award was reduced to \$63,000, however, because in its contributory negligence deliberations the jury found Claimant to be 70% at fault. Of that amount, Claimant paid approximately \$40,000 in attorney fees, witness fees, Railroad Retirement, and insurance, for a balance of about \$23,000.

Following settlement of the monetary claim, Carrier advised the Claimant, by letter dated July 13, 1989, that his seniority and employment status were terminated. Carrier conducted no investigation prior to making this decision and notifying Claimant accordingly. A Claim was filed by the Organization alleging that Carrier had violated Rule 27 of the Agreement by dismissing Claimant from service without first conducting a fair and impartial Hearing. Rule 27 reads in pertinent part as follows:

"RULE 27 - DISCIPLINE, HEARINGS, AND APPEALS

Section 1. Hearings.

(a) Except as provided in Section 2 of this Rule, employees shall not be suspended nor dismissed from service without a fair and impartial hearing nor will an unfavorable mark be placed upon their discipline record without written notice thereof."

That claim was denied by Carrier and subsequently appealed by the Organization up to and including the highest Carrier officer responsible for such matters. Thus it is properly before the Board for disposition.

In support of its position, Carrier maintains that in this case, Rule 27 is not applicable. It points out that before the trial, Claimant's counsel presented an initial demand of \$150,000, (later reduced to \$140,000) premised upon permanent disability. Thus, Carrier never removed Claimant from service, he removed himself. Further, Carrier argues that Claimant and his physician testified in a court of law that he was permanently disabled from performing railroad work. Accordingly, Carrier simply acted upon that information.

Carrier also insists that Claimant is estopped from alleging he is physically capable of returning to the service of the Carrier because of his previous, and contradictory, posture that he was permanently disabled as result of injuries sustained on duty. It maintains that the considerable award entered by the jury as a consequence of his permanent physical disability estops Claimant from contending now that his position in a court of law was a mere fiction, and that he is able to perform work. The jury determined that the contentions of Claimant and his physician were correct and that he would never be able to return to trackman work, thus Claimant is estopped from returning to work because of his success in court. Finally, Carrier argues that the monetary amount of the award to Claimant is not relevant in assessing the intent of the jury making that award.

The Organization maintains that unless Claimant voluntarily left °service (quit), failed to return to service following recall, or had been dismissed from service following a fair and impartial Hearing, Carrier had no basis for terminating his seniority. It disputes Carrier's allegation that the Claimant's seniority rights were automatically terminated upon satisfaction of the jury award, because an employee's seniority rights under the Agreement are separate from and unaffected by a civil action under the FELA.

In addition, the Organization argues that Carrier is in error when it alleges that because Claimant received a monetary judgment for permanent total disability against Carrier in connection with a civil action under the FELA he is estopped from returning to employment with the Carrier. The Organization insists that Carrier has failed to establish that the conditions for estoppel exist in this case; specifically, Carrier has not shown a misrepresentation of facts, that the jury relied on such a misrepresentation for making its decision, and that the jury intended for the award to compensate Claimant for a permanent disability from railroad work. It points out in particular the ultimate award of \$23,000, which, according to the Organization, could not possibly have been contemplated as other than compensation for "pain and suffering," a temporary disability, past wage loss, and future wage loss.

As remedy, the Organization seeks to have Claimant's seniority reinstated and asks that if Claimant, at some future date is able to present himself for service, he should be afforded the opportunity to work in accordance with his seniority.

Upon careful review of the extensive record before the Board, we conclude that the claim in this case must be denied. The issue before the Board does not involve a matter of discipline assessed, but rather a judgment by Carrier, based upon a jury trial and subsequent monetary award, that Claimant was no longer capable of ever returning to work as a Trackman. It is well established in numerous forums that having achieved a verdict awarding money for an injury which allegedly permanently deprives an employee from returning to his or her former work, that employee is estopped from then taking a contrary position in order to obtain reemployment in that work. As is noted in Third Division Award 6215:

"* * *

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 on 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.

* * *

(See also, PLB No. 3001, Award 2; PLB No. 3991, Award 6; Third Division Awards 26366, 28217). Moreover, the case before us is distinguishable from PLB No. 3775, Award 35, offered by the Organization to support its claim. In that case Carrier appealed the verdict favorable to the injured employee, and the appeal was pending as the Claim was presented before the referee. In that Award it was properly held that

"Carrier's appeal of the jury judgment rendered in favor of the Claimant is an act inconsistent with the assertion of judicial estoppel.... It is possible that the judgment could be reversed on appeal. In that circumstance, the Claimant would be both without the judgment and without seniority for a job with the Carrier."

In the case before this Board, Carrier has already paid the amount of the judgment, and has filed no appeal.

Testimony by Claimant's physician during the trial established, persuasively enough for the jury, that Claimant would be unable to resume his activities as a Trackman:

"* * *

Q. Doctor, have you prescribed any physical limitations or restriction on Richard's activities?

A. Yes. My limitations are that he should not -- basically on the OSHA scale, he can do what's called medium to medium light work. He can lift up to 50 pounds on occasion and no more than 30 pounds on a frequent basis. I also told him that he should avoid activities that require him to twist and lift at the same time and that he should use good body mechanics any time he is trying to lift.

In addition, because of his back complaints, he should avoid activities that require him to stand for any length of time, sit for any length of time in one position, and also activities requiring him to do a lot of bending.

Q. Now, Doctor, being here in the Altoona area ...[obscured in the copy] years are familiar with what the work of a trackman is on the railroad?

A. Yes. In fact we went on a tour one day, and they showed us what trackmen did.

Q. Good. Now, the type of work that a trackman does, is Mr. Balestino capable of doing that work?

A. No.

Q. In your opinion, is he likely or is he going to be capable of doing that work in the future?

A. No. I don't feel that he can.

Q. What is his prognosis?

A. His prognosis is good as far as activities are concerned, as long as he avoids lifting. The lifting is going to be a problem for him permanently, I am afraid.

Q. And this disability you are describing, his inability to do the trackmen's work, what is the cause of that?

A. The cause of that is the injury that he sustained.

Q. While he was working, the one you described before?

A. Yes, the one we described before.

* * * *

Thus, Claimant cannot now persuasively maintain that he should retain seniority rights in a mode of employment which a court of competent jurisdiction has determined he is physically unable to perform. Having relied upon his medical disability in obtaining a favorable verdict in a court of law, Claimant may not now be allowed to recant and inveigh against Carrier for agreeing with him, with his physicians and with the jury.

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 17th day of September 1992.