

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The Agreement was violated when the Carrier improperly withheld B&B Carpenter R. G. Crawford from service beginning on March 22, 1990 (System File MW-90-70/492-53-A SPE).

(2) The Agreement was further violated when the Carrier deprived the Claimant of his rights under the Agreement to vacation, insurance and all other rights in connection with the violation referred to in Part (1) hereof (System File MW-90-140/497-27-A).

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, the Claimant shall be made whole for all medical and dental bills that he and his family have incurred beginning September 17, 1990 and he shall be compensated for all wage loss suffered, including straight time and overtime, beginning March 22, 1990 and continuing until he is allowed to return to duty."

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.

1. Factual Findings

The Carrier employed Claimant as a B&B Carpenter and assigned him to the San Antonio Division. On August 26, 1986, the Claimant sustained a on-duty personal injury described as a soft tissue injury to the neck which resulted in the Claimant remaining off work for approximately eight months. The Claimant returned to work in May 1987, and he continued to work until December 1987. The Claimant ceased work at that time due to intolerable pain in his neck and back.

About a month later, the employee requested the railroad to reinstate him to his former position, but the railroad refused to reinstate the employee or to examine him to determine his physical condition. The employee brought an action against the railroad for breach of the collective bargaining contract. The employee demanded lost wages from the date of his initial request for reinstatement, and he also demanded reinstatement.

In reaching a decision in this case, the Circuit Court reasoned:

"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 earlier contention."

The Court estopped the Claimant from litigating his claim for reinstatement because it contradicted his earlier position that he would be unable to return to work.

The Organization thoroughly researched the law and meticulously prepared this case. As the cornerstone of its argument, the Organization relies on Second Division Award 3837. In that case, the Second Division stated:

"In an order for an equitable estoppel to exist three requirements must be presented. (1) A material misrepresentation of fact, (2) Reliance thereon by the representee, (3) A resultant positive detrimental change of position."

The Organization reviews each element and provides additional Awards in support of its conclusion with respect to each element.

However, the Board finds the test presented by the Organization inapplicable to this case because of a critical difference in the factual circumstances. In Award 3837, the employee suffered an on-duty injury which required him to undergo surgery for spinal fusion. Later, the employee sued the Carrier alleging the spinal fusion operation had been unsuccessful, and another operation was required before the Claimant would be able to resume his employment.

The employee and the Carrier settled the case out of court. In negotiating the settlement, the Carrier demanded the employee resign or forfeit his seniority rights, but the employee refused. Ultimately, the Carrier acquiesced and settled the case. Fifteen days later, the employee's physician released him to return to work. The Carrier refused to permit the employee to resume duty.

The Second Division estopped the Carrier from refusing to fulfill its obligations under the settlement. The Second Division reasoned

"Having failed to obtain a stipulation to resign at the time of the F.E.L.A. suit was settled, Carrier will not now be heard to complain about the consequences of this failure."

The Board finds Scarano to be the appropriate standard in this case due to its factual and legal similarities with this case. Scarano, cited by the Carrier, represents offensive estoppel, and Award 3837, cited by the Organization, represents defensive estoppel. The invocation of offensive estoppel, estops the Claimant as the petitioner from instituting a new claim. The invocation of defensive estoppel, estops the Carrier as the respondent from defaulting on its previous obligations.

This is a case of offensive estoppel because the Claimant seeks to institute a new claim for reinstatement against the Carrier. Therefore, Scarano provides the correct standard of review.

4. The Invocation of the Doctrine of Estoppel in this case

In another claim involving the same parties as this claim, the Public Law Board adopted the reasoning of the Third Circuit Court of Appeals in Scarano. (Public Law Board No. 1795, Case 9.) This Board also considered the issue of estoppel in prior Awards. The Board explained the purpose of estoppel:

"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 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." (Third Division Award 6215)

The Board also held:

"When the employee alleges permanent disability resulting from injury and pursues that claim to final conclusion and obtains a judgment on that issue, he has legally established his permanent disability and the carrier is under no obligation to return him to service." (Third Division Award 1672).

The facts in the present case are on all fours with the facts of the Scarano case and similar to the facts presented in the above cited Awards. Specifically, the Claimant alleged and provided medical opinion evidence of his permanent, total disability. The jury apparently relied on this testimony because the verdict included compensation for future wage loss and future pain and suffering.

The Board considers the recovery of future earnings as a factor to consider prior to invoking the doctrine of estoppel.

"It seems to this court to contradict the applicable rule of law is firmly established that who recovers a verdict based on future earnings, the claim to which arises because of permanent injuries, estops himself thereafter from claiming the right to future reemployment, claiming that he is now physically able to return to work. Third Division Award 23830 citing Jones v. Central of Georgia Ry. Co., (USDC ND GA, August 13, 1963) 48 LC Par. 18562."

The bare size of the prior judgment and the time lapse between the verdict and the request for reinstatement are also factors to consider in determining whether to apply the doctrine of estoppel. (Public Law Board No. 1735, Award 1).

In this case, all three factors support the application of the doctrine of estoppel. First, the jury clearly awarded the Claimant money to compensate him for future wage loss. Second, the award of \$175,000 for loss of earnings suggests the jury intended to compensate the Claimant for his permanent inability to work during his years of eligibility. Finally, only four months elapsed between the jury verdict and the Claimant's request for reinstatement. The jury rendered its verdict in November 1989, and the Claimant requested reinstatement in March 1990. Based on all these factors, the Board finds the invocation of the doctrine of estoppel is appropriate in this case. The Board holds the Claimant is estopped from asserting his claim for reinstatement based on the jury verdict in his previous case.

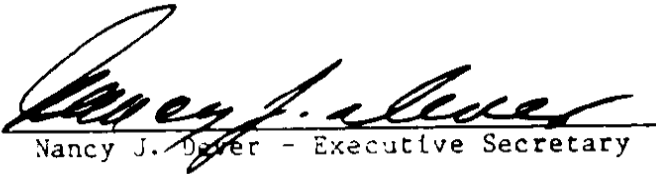
The Organization provided other arguments on behalf of the Claimant. The Organization argued the Carrier's reliance on outdated medical examinations was misplaced and in error, and the Carrier did not examine the Claimant in order to determine his current medical condition. The Organization contended the medical opinions made at the trial were outdated and invalid, and the Claimant's testimony was based on his understanding of his medical condition at the time of the trial. The Organization also argues the Carrier's characterization of the testimony given at the trial was incorrect. Because the decision on the issue of estoppel is outcome determinative, the Board need not independently address these arguments.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dyer - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.