

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29818
Docket No. MW-30263
93-3-91-3-729

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Union Pacific Railroad Company

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

- (1) The Agreement was violated when the Carrier withheld System Extra Gang Employee J. D. Henderson from service, beginning at 1:00 A.M. on August 25, 1990 at Mile Post 307.75 near Union, Oregon, without benefit of a fair and impartial investigation (System File D-149/910102).
- (2) As a consequence of the aforesaid violation, the Claimant shall be reinstated to service with seniority and all other rights unimpaired and he shall be made whole for all wage loss suffered."

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 employee 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 6, 1990, Claimant accepted \$161,250.00 from the Carrier in settlement of case brought under the Federal Employers' Liability Act (FELA) that was then in the midst of a trial. During the course of the trial, the Claimant and his physician testified at length concerning the Claimant's permanent inability to perform

work as a laborer and even expressed reservations about his operating a crane. On August 13, 1990, seven days after the settlement agreement, Claimant started work as a laborer. When Carrier officials became aware of the situation, about a month later, Claimant was taken off the laborer position.

With respect to the merits of the dispute, the Board finds the well-established doctrine of estoppel applicable in this case. The doctrine, as applied, makes two points very clear. First, the exercise of the doctrine is not disciplinary in nature and no disciplinary hearing is required. Second, the doctrine does not require that the employee be, in fact, physically disabled from performing the work. The doctrine prevents the employee from asserting that he is physically able to perform the work. Among the Awards and court decisions affirming this principle is Third Division Award 6215 which states:

"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."

The Organization's assertion that the Claimant was denied a fair and impartial hearing under Rule 48 (a) cannot be supported. The Board finds that Claimant in settling his FELA case was not disciplined or dismissed but physically disqualified from service as being unable to perform the work of laborer. The Supreme Court in Minneapolis RR v Rock, 410 U.S. 413, 414 as well as Third Division Awards such as 14173, 14249 and 16579 have sustained the right of the Carrier to withhold employees when it believes their physical condition may not permit them to safely perform their duties.

Further, it was reasonable for the Carrier to rely upon the testimony of Claimant and his doctors that he was permanently unable to physically perform the work and thus medically disqualified from performing the work, obviating a Rule 50 Medical Board determination.

In reviewing the entire record, the Board finds the actions of the Carrier in physically disqualifying the Claimant from working positions for which he held seniority, other than Roadway Equipment Operator, are sanctioned by the doctrine of estoppel.

In his FELA suit against the Carrier, Claimant's medical witness testified during his trial as follows:

"Q. In terms of the residuals from this accident of November 3, 1987, do you believe that to a reasonable medical certainty these are permanent or not problems?

A. I believe they are permanent...

Q. Doctor, are you familiar with what an extra gang laborer does in your personal knowledge?

A. From talking to numerous railroad workers over the years I have a general idea as to what they do.

Q. In terms of occupations how would you characterize it in terms of light, medium or heavy work?

A. I would describe it as very heavy work.

Q. In conjunction with Mr. Henderson's condition would you recommend that he do this job in the future?

A. I would not.

Q. Why?

A. Because I think that he is ... he would be subjecting himself to enough stress both in his neck and back that it would accelerate the process that has already started and that he would just be at great risk for further symptoms... further injury."

Given the unequivocal trial testimony that Claimant was physically unable to perform the work of a laborer, he is medically "estopped" from doing so. Having relied upon his physical impairment to obtain a favorable settlement of his claim, Claimant cannot now disavow the medical basis for that disposition to suit his current objective. The legal principle of estoppel was

properly invoked by the Carrier since it had in detrimental reliance upon the Claimant's representation of his permanent disability settled his FELA claim. Language provided in Second Division Award 1672 is pertinent in this regard.

"When an employee alleges permanent disability resulting from the 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."

The instant case is consistent with Awards where the doctrine of estoppel has been applied and the Carrier's decision to deny Claimant's request to return to work upheld. A comparable fact pattern is described in Third Division Award 24116 as follows:

"...a claimant is allegedly injured on-the-job and files a claim and/or a lawsuit against the Carrier under the Federal Employer's Liability Act; Claimant represents himself as being incapable of resuming his former occupation; relying on testimony of the Claimant, his medical expert, or the representations by his attorney during the proceedings, he is awarded a monetary judgment."

Under the circumstances, the Carrier's reliance upon Claimant's representations of his physical disqualifications at the judicial proceeding are dispositive of his capability to resume work as a laborer and thus the Carrier's refusal to reinstate him was not arbitrary or capricious. The Carrier's judgment that the doctrine of estoppel has been applied to bar similar claims is supported by numerous Awards of the Board and Public Law Boards. See PLB No. 1660, Award 21; PLB No. 3001, Award 2; First Division Award 6479; Second Division Award 9921; Third Division Awards 29408, 28719, 28217 and 23830. See also Scarano v. Central Railroad of New Jersey, 203 F.2d 510.

Of particular significance is Second Division Award 11641 wherein a relatively similar dispute Second Division Award 11621 was cited as follows:

"In that Award the Board stated that evidence and allegations presented and made before the court in order to win an award could not be nullified by the Claimant at a later point simply because was to his advantage to do so.

The only difference between this case and that one is that here an out-of-court settlement was made. In both cases there were pleadings of permanent injury."

Therefore, the Board will follow the Awards which hold the doctrine of estoppel applies to the merits of the dispute and deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin, Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.