NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29937
Docket No. MW-30030
93-3-91-3-431

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Western Lines)

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

(1) The Agreement was violated when the Carrier arbitrarily terminated the seniority of I&R Foreman R. W. Kaster and subsequently withheld him from service beginning in January, 1990 without affording him the benefit of a three (3) doctor panel (Carrier's File MofW 105-4 SPW).

(2) The claim* as presented by District Chairman George Nelson on March 12, 1990 to District Engineer D. T. Wickersham shall be allowed as presented because said claim was not disallowed by District Engineer Wickersham in accordance with Rule 44.

*The initial letter of claim will be reproduced within our initial submission.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the seniority of Mr. R. W. Kaster shall be restored unimpaired and he shall be allowed to return to service in accordance with his physical condition as determined by an examination under a three (3) doctor panel as provided for under Rule 32(a), (b), (c) and (d)."

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 employe 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.

The fact situation in this case is clear and not really in dispute. The Claimant, while working as an I&R Foreman, sustained an on-duty personal injury in September 1982. Thereafter, he was utilized by the Carrier in its "light duty" program until September, 1985, when he was placed on a sick leave status. Subsequently, in 1986, Claimant entered a suit in a court of appropriate jurisdiction pursuant to the Federal Employees' Liability Act for recovery of damages caused by the September, 1982 on-duty injury. The jury in that court action found in favor of the Claimant and, on May 16, 1986, a judgment was entered in Claimant's favor and against the Carrier in the amount of $338,643.00. Later, on or about February 7, 1990, Claimant presented himself to the Carrier, along with an examination report from his personal physician, and requested reemployment with the Carrier. By letter dated February 12, 1990, Carrier's Superintendent notified Claimant that Carrier's Medical Examiner would not authorize his return to service.

Thereupon, by letter dated March 12, 1990, the District Chairman of the representative Organization initiated a claim on behalf of Claimant requesting the establishment of a panel of doctors under the provisions of Agreement Rule 32 - Physical Examinations. On May 8, 1990, Carrier denied the Organization's request for the creation of a panel of doctors. This denial was rejected by the Organization and appealed through the normal on-property grievance procedures.

Before this Board, the Organization has advanced the following contentions:

> "(1) Carrier violated rule 44 - Claims and Grievances when the initial claim was denied by a Carrier official other than the official to whom the claim was presented, citing with favor the decision of 3rd Div. Awd. #26684;
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> (2) Carrier refused to examine Claimant to determine his current condition and thereby violated the provisions of rule 32;

(3) Carrier, during the FELA court action, acknowledged that Claimant could "someday be physically fit enough to return to service" and therefore, Carrier's reliance on the doctrine of Estoppel was misplaced and without merit, citing with particular favor the decision reached in Award No. 1 of PLB 436 involving this same Carrier."

The Carrier, on the other hand, contended that the subject of the dispute as listed with this Board was significantly different from the claim as initiated and progressed on the property; that Rule 44 relating to the handling of claims and grievances was never cited by the Organization during the on-property handling of this dispute; and that the doctrine of estoppel was properly applied in this instance because the testimony and arguments before the court which led to the jury award established permanent disability and the award in that case included damages for future employment. Carrier cited with particular favor the decision reached in Award 9 of PLB No. 1795 involving these same parties.

Rule 44 - Claims and Grievances reads, in pertinent part, as follows:

"RULE 44 - CLAIMS AND GRIEVANCES

Claims or grievances shall be handled in accordance with Article V of Agreement of August 21, 1954, as follows:

1. All claims or grievances arising shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, * * * *."

Rule 32 - PHYSICAL EXAMINATIONS reads, as follows:

"RULE 32 - PHYSICAL EXAMINATIONS

Held Out of Service Due to Physical Condition. - (a) An employe removed from service by the Company due to physical conditions will be advised in writing at the time of such action. In such cases the Company may require the employe to submit to physical examination prior to returning to service.

Physical Disqualifications. - (b) If an employe should be disqualified for service or restricted from performing service to which he is entitled by seniority on account of his physical condition, and feels that such disqualification is not warranted, the following procedure will govern.

A special panel of doctors consisting of one doctor selected by the Company specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering; one doctor to be selected by the employe or his representative specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering; the two doctors to confer, and if they do not agree on the physical condition of the employe they shall select a third doctor specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering.

Such a panel of doctors shall fix a time and place for the employe to meet with them for examination. The decision of the majority of said panel of doctors of the employe's physical fitness to remain in service or have restrictions modified shall be controlling on both the Company and the employe. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the employe change.

The Company and the employe will be separately responsible for any expense incurred by the doctor of their choice. The Company and the employe shall each be responsible for one-half

of the fee and expense of the third member of the panel.

Light Duty, Incapacitated Employes. - (c) By agreement between the Company and the General Chairman or his authorized representative, employes subject to the scope of this agreement who have been disqualified because of physical condition from performing the full duties of their regular assignments may be used to perform such light work within their capability to handle, as is or can be made available.

Disability and Retention of Seniority. - (d) An employe retiring under the disability provisions of the Railroad Retirement Act retains his seniority and his right to return to service, as provided for by the Act, and the position held at the time of his retirement shall be advertised under provisions of Rule 10."

The threshold issue which must be addressed in this case concerns the Organization's argument relative to the fact that a Carrier official other than the one to whom the initial claim was presented acted as the denying officer. There is no question but that the claim was submitted to the District Engineer and that the denial letter was issued by the Manager, Clerical Operations.

Our examination of the language of the negotiated Rule 44, quoted supra, reveals that claims must be presented "to the officer of the Carrier authorized to receive same." The Rule, however, does not require the Carrier to use the same officer who received the claim to issue the denial of the claim. The Award cited by the Organization (Third Division Award 26684), is significantly distinguishable from the fact situation which exists in this case. In Award 26684, the negotiated rule required that claims be submitted to "the Division Engineer or other designated official" and that disallowance of such claims be made by "the Division Engineer or other designated official." The rule in that case went on to identify and list the other designated officials who were referenced in the rule. Because someone other than the specifically designated official issued the claim denial, the Board in Award 26684 properly held that a violation had occurred. Here, however, there is no such restriction on who must reply to claims. The authors of Rule 44 were sophisticated, knowledgeable individuals wise in the ways of contract construction. If they had intended to require that the same officer who receives claims must also respond to them, they would have done the same as was done by the framers of the rule

involved in Award 26684. Rule 44 on this property requires only that "the Carrier" must reply to claims. Our position in this regard is supported by the comparison of other Awards on this same subject which is intelligently set forth in Third Division Award 27590. The Organization's contention in this regard is therefore rejected.

The second issue which must be addressed in this case concerns the Carrier's contention that the subject of the dispute as listed with this Board is not the same as the claim submitted to Carrier's highest appeals officer. To be sure, this Board has held on many occasions that the claim which is proper to bring to this Board must be the same claim which was listed with and handled by Carrier's highest appeals officer. However, we have also held that neither this Board nor the Railway Labor Act elevates form over substance or technicalities over reality. Our examination of the on-property subject and discussion and decision by Carrier does not vary to any significant degree from the language of the claim as presented to and argued before this Board. Therefore, Carrier's contention in this regard is rejected.

On the question of whether or not the principle of estoppel is applicable in this case, this Board has carefully examined the case record as it was developed by the parties during their on-property handling of the case. The case record includes excerpts from the court proceedings as well as communications from the attorneys who handled the court proceedings. Inasmuch as neither party to this dispute has challenged any of the court record excerpts or other items of communication and inasmuch as both parties have respectively affirmed that "all data herein submitted in support of our position has heretofore been presented to the Carrier and is hereby made a part of the question in dispute" (Organization), and "all data herein submitted have been presented to the duly authorized representative of the Employees and are made apart of the particular question in dispute" (Carrier), this Board accepts all material in the case record as germane to the issue here in dispute.

From our examination of the case record as it stands before this Board, we are convinced that the principle of estoppel is properly applicable in this situation. There is no question from this record that Claimant, through his expert witness and representatives, assumed the position that his injuries were of such a nature that they were permanent. The medical expert who testified on Claimant's behalf clearly and unequivocally stated that he "would strongly recommend that he does not" when asked for his opinion as to whether Claimant could perform the type of work that he normally performed. The record also indicates that in the argument to the court on Claimant's behalf, the jury was asked to award damages for past lost wages, for future loss of wages, for

future medical bills plus compensation for pain and suffering. The attorney who represented Claimant candidly acknowledged that "The jury apparently decided to protect Bob against all eventualities." It is the conclusion of this Board on the basis of the record as it exists in this case that the jury award of $338,643.00 did, in fact, protect Claimant against all eventualities including future wage loss.

It is interesting to note that the same, or very similar, arguments which are advanced by the Organization in support of their contentions in this case relative to Carrier's refusal to have Claimant examined by a panel of doctors were also made in previous cases which have been examined by this Board and previously rejected. For example, in Third Division Award 26081, this Board held that: "The Agreement nowhere requires the doing of an unnecessary act." See also the decisions in Third Division Awards 27302, 29429 and 29780.

The estoppel principle has been repeatedly examined by several courts as well as by all Divisions of this Board and Public Law Boards. The Board's conclusion in Award 9 of PLB No. 1795 sums up the situation succinctly, to wit:

> "Clearly, Claimant recovered 'a large sum of money in satisfaction of his claim', not only for loss of current earnings but for loss of prospective earnings 'for a substantial future period' based on permanent disability.
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> As was stated by the Court in the Ellerd case, supra:
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> > 'In the face of these facts, the applicable rule of law is firmly established that one 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.'" (Emphasis added)

On the basis of the evidence of record in this case and for the reasons outlined herein, this claim must be denied.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 2nd day of December 1993.