

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30762
Docket No. SG-31539
95-3-93-3-596

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Illinois Central Railroad

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Illinois Central Railroad (IC):

Claim on behalf of D.E. Cureington for reinstatement to service with payment for all time the Claimant is withheld from service, account Carrier violated the current Signalmen's Agreement, particularly Rules 24 and 35, when it denied the Claimant's request to return to service after he received a medical release to return to work from a physical disability leave of absence." BRS File Case No. 9227-IC.

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.

Claimant held the position of Traveling Signal Maintainer with headquarters at Yazoo City, Mississippi. He sustained a lower back injury on September 20, 1991, but completed his shift. Subsequently, he required extensive medical treatment and was placed on a medical leave of absence as provided in Rule 24, which reads in part:

"Rule 24 - LEAVE OF ABSENCE

(a) Any employee absent from duty because of physical disability will be granted a leave of absence and necessary extensions until it is possible to return to duty.

* * *

(e) Employees on a leave of absence will retain their seniority. Employees failing to return to duty on or before the expiration of leave of absence will lose their seniority, unless an extension has been granted. Employees on leave of absence may return to service prior to expiration of leave of absence by giving five days' advance written notice.

(f) Employees returning from temporary absence due to illness or disability, suspension, leave of absence or vacation may revert to their regular position or may within ten (10) days after return to duty exercise seniority to any position bulletined during their absence. If during this absence their regular position has been abolished or permanently filled by a senior employee, the employees may exercise seniority according to the provisions of Rule 20."

The Claimant was hospitalized by Dr. G. C. Warren, a Carrier physician, on September 30, 1991. He was released from the hospital on October 4, 1991. At the time, the physician indicated that Claimant had been placed on extensive physical therapy and medication and had demonstrated improvement. He could not, however, set a time line for the Claimant's return to work.

The Claimant was hospitalized once again on January 27, 1992 and released five days later. The Carrier physician advised then that the Claimant would not require surgery and showed continued improvement. He could not predict when the Claimant could return to service.

The Claimant then applied for sickness benefits through the Railroad Retirement Board and a supplemental insurance program. The physician reported that while the Claimant could not return to work at the time, he was improving and could probably be able to return to work in August 1992.

On July 7, 1992, the Claimant filed a complaint against the Carrier in the Circuit Court of Yazoo County, Mississippi. He alleged he suffered severe, painful and permanent injuries in connection with his accident on September 20, 1991, and requested damages of \$2,008,000.00

By way of a deposition and a letter, the Carrier physician and the Manager of Crawford & Company Health and Rehabilitation, respectively, provided opinions that the Claimant would continue to improve and the prognosis for his returning to work was very good.

On January 20, 1993, the Claimant failed to win a verdict against the Carrier. By a ten to two decision the Court ruled in favor of the Claimant on the following issue:

"Do you find that Illinois Central Railroad Company or any of its employees were negligent, no matter how slight, in one or more of the particulars alleged:

Yes _____ No X "

The Claimant continued therapy until March 14, 1993, when he advised the Carrier he had been released for duty by both his personal physician and the Carrier physician, Dr. Warren. He communicated he was ready to return to work.

The Carrier, by letter dated March 23, 1993, advised the Claimant that because he had claimed as part of his civil suit against the Carrier, permanent injuries that would cause future earnings loss, that he was estopped from now alleging that he was able to return to work. He was permanently disqualified from any work with the Carrier.

On May 10, 1993, the Organization filed an appeal on behalf of the Claimant. The Organization holds that the Carrier errs in attempting to estop the Claimant from returning to work on the basis he contended permanent injury in his civil case. In reality the issue of whether the Claimant was permanently injured was never decided by the Court. The only thing decided was whether the Carrier was negligent in the incident which caused the Claimant's injury in the first place. The Organization contends the Court made no other decisions.

Furthermore, the Carrier, as part of its defense, continually argued before the jury that the Claimant's employment rights were protected and he could return to service whenever his injuries improved. It should now be precluded from disavowing that claim and refusing to allow the Claimant to return to work. Since the Organization has shown that the jury relied on the Carrier's assertions on this point, it asserts that it is the Carrier who is estopped from refusing to allow the Claimant's return to service.

According to the Organization, the overriding number of cases on this issue hold that in order for the estoppel doctrine to apply against the Claimant in this type of case, the Claimant had to successfully argue his position in the previous forum. In this case, not only did the Court not rule on the Claimant's permanent disability, it did not rule in his favor in any regard. The Claimant was not awarded any damages.

The Organization also contends the Carrier violated Rule 35 - Discipline, which reads in part:

"(a) An employee who has been in the service more than 60 days will not be disciplined or held out of service without first being given an investigation. The Employee will be advised in writing at least seventy-two hours prior to such investigation of the exact charge or charges. Charges will be made in writing within ten days of knowledge of an offense. Suspension in proper cases pending a hearing shall not be deemed a violation of this rule."

To the contrary, the Carrier urges the Board to decide this case based on the doctrine of Collateral Estoppel. The Claimant argued in Court that his permanent injuries prevented him from returning to work. Therefore, he asked for an award and damages in excess of \$2,000,000. The Claimant cannot now come into a different forum and deny his earlier contentions.

According to the Carrier, the overwhelming number of cases on this issue have held that once a Claimant presents testimony in one forum, in this case the court, he cannot later in another forum refute his own testimony. He is bound by the testimony he presented in the previous forum. The fact he did not receive a settlement in the first case is irrelevant.

Furthermore, the Carrier points out that the Claimant petitioned for and received a disability annuity from the Railroad Retirement Board. This also precludes him from requesting to return to work.

In spite of the foregoing, following the parties' June 30, 1993 conference, Carrier's Director Labor Relations agreed to reinstate Claimant's name to the seniority roster.

This Board looked closely at the issue of Collateral Estoppel. Basically:

"...the doctrine which recognizes the determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings against each other. In a subsequent action between the parties on a different claim, the judgment is conclusive

as to the issues raised in the subsequent action, if these issues were actually litigated and determined in the prior action." Restatement Judgments §45. (Law Dictionary, Steven H. Giffis, Barron's Educational Series, Inc., Woodbury, New York, 1975)

In view of the above definition, the Organization may have raised a valid point in asserting that the Court never addressed the issue of whether the Claimant was permanently disabled. Although the Court ruled that the Carrier was not negligent, there was nothing definitive said by the Court which would allow us to determine if the Claimant's disability was ever considered by the jury in arriving at its decision. Somewhat to the contrary, but of little probative value, was a letter from one of the jury members. Regardless, based on a review of the Awards presented by the Parties, the Board does not believe it is necessary to arrive at this determination to resolve this matter.

The Parties supported their positions with several thoughtful arbitral and legal decisions. Many of the arbitral Awards cite the case of Scarano v. Central Ry. Co. of New Jersey, 203 F.2d 510 (3rd Cir. 1953) as the appropriate standard in determining whether an employee is estopped from seeking redress through a second forum. Scarano held:

"(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. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts will not tolerate."

Along these same lines, the Organization cited Third Division Award 28217. Within the Award itself the Board cited the Court case of Barnard Morawa v. Consolidated Rail Corporation and The Brotherhood of Maintenance of Way Employees(#84 - CV - 05194 - DT, 5/30/86) as follows:

"The first issue before this Court is whether the doctrine of judicial estoppel should be applied in a subsequent proceeding when a party has previously asserted an inconsistent position in a previous litigation. The doctrine of judicial estoppel is designed to protect the integrity of the judicial process. . .The doctrine applies to a party who has successfully asserted a position in a prior proceeding and estops that person from asserting an inconsistent position in a subsequent proceeding. . .As the Supreme

Court stated, 'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position (emphasis added) he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'

In view of those two court decisions and the fact that the doctrine of estoppel is an equitable doctrine, it seems to this Board the standards, as grounded in those cases and in several subsequent arbitral decisions from the Third Division, require the Claimant to be successful in the initial forum, usually the Court, the Court decision to be based on the Claimant's contentions he was permanently disabled, the Award of the Court be sufficient to compensate the employee for the loss of future earnings, and consideration be given to the time lapse between the jury decision and the Claimant's request to return to work. As opined in Third Division Award 29429:

"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." (See also Third Division Awards 6215, 29662, and Public Law Board No. 4746, Award 27).

Since all of those factors are not present in the instant case, it is the Board's decision that the doctrine of estoppel does not apply.

The Board realizes the Claimant is currently receiving a disability from the Railroad Retirement Board. However, it is not unheard of for an employee to receive such payments and subsequently recover from his/her disability sufficiently to return to work. It is general practice that in such situations the employee is not prevented from returning to work and is protected under the seniority provisions of the Agreement.

Based on the foregoing, it is the Board's position that the Claimant should be permitted to return to his position, provided he receives the proper clearance from the Carrier's Director Medical Services. If the Claimant is not given medical clearance from the Carrier's Director Medical Services, he can submit the dispute to a panel of three doctors as provided in the existing Agreement. In view of the fact the Claimant applied for and was receiving compensation for his disability from the Railroad Retirement Board,

he will not receive any additional compensation. He will retain his seniority and will be treated like any other employee who petitions to return to work after being considered disabled by the Railroad Retirement Board.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.