

PUBLIC LAW BOARD NO. 1795

Award No. 27
Case No. 27

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

- STATEMENT "1. That the Carrier violated the Agreement when it dismissed Track Laborer K.J. Hill while he was on sick leave and without according Claimant the benefit of a fair and impartial hearing.
- OF CLAIM
2. That the Carrier further violated said Agreement on October 14, 1977 when it refused to accept Claimant's Return to Duty Release as a valid reason.
 3. That Claimant now be returned to the service of the Carrier with seniority and all other rights restored and that he be compensated for wage loss suffered beginning October 14, 1977 and each day subsequent thereafter until he is placed on his rightful position."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant entered Carrier's service as a Track Laborer on December 14, 1970. On July 29, 1974 he sustained an injury while on duty in a car accident. Approximately one month later he underwent a surgical procedure involving the removal of a ruptured disc in his back. Following the surgery, Claimant made several attempts to return to duty but was not successful. The attempts to return to duty occurred on April 1, 1975, in July of 1975 and in May of 1976. In each instance he apparently was unable to work and was returned to a hospital. Following June 23, 1976 Claimant did not return to work with Carrier. Having been unable to reach a satisfactory settlement with the Carrier's Claims Department with respect to his injury Claimant initiated a suit against the Carrier under the terms of the Federal Employers Liability Act. The suit was

ultimately tried on March 8, 1977 and following the trial the jury awarded Claimant the sum of \$50,000.

On July 22, 1977 Carrier sent Claimant a letter by certified mail, return receipt requested, which stated as follows:

"We have information that in the course of your trial regarding your accidental occurrence near Cruzatte, July 24, 1974, three doctors testified that you can never again return to the occupation of Track Laborer because of your physical condition, and in the face of this evidence, the jury returned a verdict in your favor.

For the reasons above, your employment relationship with the Southern Pacific Transportation Company has been terminated and your record enclosed accordingly."

The above letter was received by Claimant, according to the return receipt on August 1, 1977. On October 14, 1977 Claimant reported for duty with a release from his doctor (Dr. W.C. Robertson) in which the doctor released him to full duty. Carrier refused to allow Claimant to return to duty stating that he was no longer an employee. On October 23, 1977 the claim herein was initiated by the Organization requesting monetary losses from October 14, 1977 and in addition the convening of a three doctor panel under Rule 32 of the Schedule Agreement.

The Organization's arguments in support of its claim are several. First it is claimed that no doctor testified at the trial for damages against Carrier that Claimant would never be able to work as a Track Laborer again. It is argued further that had there been such testimony the jury would surely have awarded a much larger sum of money than \$50,000. It is asserted further that the \$50,000 would not have covered Claimant's loss of wages for the period he was off work, much less any future loss of earnings and hence cannot be considered to be a major award in his favor by the court. It is contended further by the Organization that not only did the Claimant not hold himself out as being unable to work and did not receive a large sum of money but more importantly, he was improperly dismissed by Carrier. Petitioner argues that under Rule 45A all employees with sixty days of service may not be disciplined or dismissed without first

being given a fair and impartial hearing. Such hearing was not offered to Claimant and hence his dismissal or termination was improper.

As a threshold issue Carrier insists that the claim before this Board should be dismissed since Claimant was not an employee of Carrier when the claim was initiated. Carrier asserts that all of Claimant's rights under the Agreement expired no later than October 1, 1977 which was sixty days after his receipt of Carrier's letter indicating his termination on August 1, 1977. Carrier cites Rule 44 of the Agreement which provides, inter alia, that all claims or grievances must be presented in writing within sixty days from the date of the occurrence in which the claim or grievance is based. Carrier insists that since there was no appeal of its letter of July 22, in timely fashion, the Claimant has no standing as an employee much less before this Board. Without prejudice to this position Carrier also argued that Claimant was estopped from returning to its service by virtue of the testimony given in the trial for damages on his behalf by three doctors, all of whom testifying that he would never be able to return to his former occupation of Track Laborer. Carrier points out that the situation in this dispute is almost identical with that of the dispute covered by Award No. 9 of this Board in which Claimant was estopped from asserting his claim by virtue of similar medical evidence at a trial for damages.

An examination of the record of this dispute reveals that three physicians testified (at the FELA trial) that Claimant would never be able to return to his former occupation of Track Laborer. It must be assumed that the verdict awarding Claimant fifty thousand dollars was at least in part based on this testimony.

The situation set forth in this dispute is virtually identical to that considered by this Board in Award No. 9. In the earlier Award we cited a number of court cases dealing with the question at issue herein and indicated that the controlling principal is that an employee is estopped from asserting a right to return to work after persuing an FELA claim in which he held out his inability to work and received a large sum of money. The principal of estoppel, supra, clearly applies to this dispute; consequently, the claim will be denied.

AWARD

Claim denied.

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I.M. Lieberman

I.M. Lieberman, Neutral Member

S.E. Fleming

S.E. Fleming, Employee Member

San Francisco, CA

June 27, 1979

L.C. Scherling

L.C. Scherling, Carrier Member