SPECIAL BOARD OF ADJUSTMENT NO. 894

AWARD NO. 1495

CONSOLIDATED RAIL CORPORATION

VS.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: Challenge to the Carrier's determination that D. P. DeFalle is judicially estopped from returning to service as a Locomotive Engineer.

STATEMENT OF FACTS: Claimant D. P. DeFalle entered the service of the carrier on July 27, 1976, as a Carpenter in the Maintenance of Way Department. On June 4, 1979, he transferred to engine service as a Fireman.

On June 15, 1980, the claimant was assigned as the fireman on a through freight train operating between Harrisburg, Pennsylvania and Conemaugh, Pennsylvania. As the claimant's train approached Conemaugh

it struck and killed a non-railroad individual who was crossing the tracks. The claimant was operating the train at the time of this incident.

On February 24, 1981, the claimant was assigned as the fireman on a through freight train operating from Conway, Pennsylvania to Altoona, Pennsylvania. While en route claimant's train broke a coupler and a part of the train was separated. In the process of replacing the broken coupler, Flagman George Eicher was killed when he was pinned between the couplers of the cars that had parted.

On March 9, 1988, the claimant initiated a lawsuit against the carrier under the Federal Employers' Liability Act (FELA), the Safety Appliance Act and the Boiler Inspection Act. Claimant alleged severe and disabling emotional distress due to his involvement in a series of accidents resulting in fatalities and near misses, allegedly caused by the carrier's negligence. During the processing of such action claimant's psychiatrist testified that DeFalle could never return to his former employment as an engineer with the railroad because of his condition, which was diagnosed as paranoid personality with depression and obsessive traits. The case was tried before

a jury in November of 1990. Following the trial, and before submission of the case to the jury, Claimant DeFalle's lawsuit was dismissed by the Judge who granted the carrier's motion of "non-suit".

On November 4, 1989, the claimant was assigned as engineer in the pool operating between West Brownsville, Pennsylvania and Conway, Pennsylvania. On November 4, 1989, the claimant marked off sick and on November 9, 1989, he marked up for service. On November 11, 1989, he again marked off sick and marked up on November 13, 1989, at 8:40AM. At 1:12PM on November 13, 1989, the claimant was removed from service for medical reasons. By letter dated January 8, 1990, following several telephone discussions with the claimant, Conrail Medical Director P. R. Hanson, M.D., informed the claimant that he could not be qualified for return to work given an assessment of the claimant's medical condition by the claimant's physician.

By letter dated August 22, 1991 the claimant's physician released the claimant to return to work with Conrail. In a letter dated August 30, 1991 the carrier's medical director (I. Hawryluk, M.D.) addressed a letter to the

claimant's physician, Dr. A. V. Corrado, requesting additional information concerning the claimant. Dr. Corrado responded in a letter dated November 19, 1991.

On November 27, 1991, the carrier's medical director (Hawryluk) addressed a letter to the claimant scheduling a return-to-duty physical examination for December 5, 1991. On December 17, 1991, Medical Director Hawryluk issued an MD-40, qualifying the claimant for return to duty based on Dr. Corrado's evaluation and the return-to-duty examination.

Notwithstanding such medical release, certain members of the Transportation Department expressed concern as to whether the claimant could return to duty as a locomotive engineer. Responsively the carrier arranged for an independent psychiatric examination to be conducted by Dr. Robert I. Slayton. Following such analysis claimant was determined qualified for return to duty (MD-40 dated February 3, 1992).

Again the Transportation Department expressed serious concern, and on February 5, 1992, Dr. Hawryluk issued a supplementary MD-40, disqualifying the claimant pending further medical review.

By a letter dated January 6, 1992, the District Chairman brought this matter to the attention of the Senior Director-Labor Relations. On March 20, 1992, the Senior Director-Labor Relations addressed a letter to the District Chairman advising him that the claimant was judicially estopped from returning to employment with the carrier. Failing to reach a mutually satisfactory settlement, the dispute was submitted to this Board for final resolution.

FINDINGS: Under the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

Although claimant's history of accidents, court appearances, medical and psychological examinations represents a "mixed bag", we cannot summarily ignore the unconditional diagnosis of Mr. DeFalle's physician expressed during the discovery portion of the FELA action -- "paranoid personality with depression and obsessive traits, which will probably

worsen with age." Even if such diagnosis was subsequently revised and claimant was examined by carrier designated physicians, the questions of emotional stability, suitability and safety have not been finally resolved to the carrier's satisfaction; as the employer they are entitled to establish and enforce reasonable qualifications.

Furthermore, the affirmative defense of estoppel is not void of merit. "Waiver" has long been defined by both courts and arbitrators as an intentional relinquishment of a known right [(28 Am.Jur. 2d, Section 154, et seq.), Palmer v. Fuqua, 641 F.2d 1146]. "Estoppel", however is generically different from "waiver"; it does not require intent, nor does it validate the factual allegations which provide the basis for such defense. From a practical standpoint, the application of such (estoppel) doctrine merely conditionally "closes the mouth" of a knowledgeable complainant; it has been described as:

> "A bar or impediment, raised by the law, which precludes a man from alleging, or from denying, a certain fact or state of facts, on consequence of his previous allegation or denial or conduct or admission,..." (Black's Law Dictionary)

Both "waiver" and "estoppel" may be inferred from a participant's (agent's) conduct and, when conclusively proven, may excuse a party from strict conformity with obligations of an otherwise binding agreement.

The application and viability of such an affirmative defense in this forum (arbitration) is clouded; an arbitration board's expertise is in the "law of the shop", not the "law of the land". However, a substantial number of awards, both within and outside the industry, strictly apply the principles of both "waiver" and "estoppel." As noted by Referee Fred Blackwell in PLB 4410, Award No. 95:

> "...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."

We would note that such "doctrine" has too often been summarily applied in arbitration without any apparent consideration of whether there was any proven injury or detrimental reliance (e.g. ingredients of judicial estoppel). Notwithstanding such arbitral opinions, conventional wisdom suggests that such a (estoppel) defense should have a very limited application in arbitration.

Based on the representations of the claimant (agent-physician) and the subsequent vacillations of the carrier's medical officers, we have determined that claimant can safely be restored to active service only after satisfy the following terms and conditions:

1. He shall be expeditiously examined by an (third party) independent medical doctor and psychiatrist, jointly selected by a representative of the carrier and the organization.

2. If claimant is determined to be both physically and mentally qualified to be returned to active service as an engineer, taking into consideration the recurring requirements of such position as defined by the carrier, then he shall be expeditiously returned to service.

3. In recognition of the unique mitigating circumstances involved, in the event that claimant qualifies for return to service under this Board's order, he shall receive compensation under the following, non-precedential, formula:

Total straight time earnings (no overtime, holiday, vacation, etc.) that claimant would have received from the carrier beginning March 1, 1992, and continuing until returned to active service here under.

LESS: Total personal income received from any and all sources (e.g. unemployment, severance, etc.) for the identical period (March 1, 1992 until returned to service here under).

AWARD: Claim conditionally sustained as prescribed hereinabove.

DON B. HAYS, Neutral Member

P. C. POIRIER, Carrier Member

~~J. A. CASSIDY, JR.,~~ Organization Member

DISSENT ATTACHED

11/15/95
DATE

CARRIER DISSENT
SPECIAL BOARD OF ADJUSTMENT NO. 894
AWARD NO. 1495

I dissent to the finding that there should be consideration of whether there was any proven injury or detrimental reliance in arbitration involving estoppel. The application of estoppel in arbitration is limited only by the position taken by the employee in a legal proceeding. The Carrier merely insists that the employee be held to that position in subsequent actions.

Peter C. Poirier
Carrier Member