SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 239

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's decision to terminate the seniority of employe P. Windom for his alleged failure and/or refusal to respond in any way to a Carrier letter dated November 11, 2010 is in violation of the Agreement (Carrier's File CS-MW-1-1-5).
2. As a consequence of violation referred to in Part 1 above, Claimant P. Windom shall be reinstated, have the letter terminated his seniority rescinded and otherwise have the matter handled accordingly."

Upon the whole record and all the evidence, after hearing, the Board finds 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 under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on January 10, 2005 as a Laborer and was working as a Track Repairman at the time the events which led to this case occurred. On August 6, 2010 the Claimant was exiting the cab of a Carrier vehicle when his foot slipped and caused him to twist his knee. The resulting injury caused the Claimant to go on medical leave beginning on August 12, 2010. On August 19, 2010 the Claimant was notified via certified letter that he needed to provide medical records so the Carrier could make a determination regarding his fitness for service. After not receiving the requested records, the Carrier sent another certified letter on October 1, 2010. The Carrier then received a voice message from the Claimant asking whether it had received his records. As the Carrier had not received any records, it sent a final certified letter on November

11, 2010 again making the same request. The November 11, 2010 letter contained language stating that failure to provide the requested information within 10 days would result in forfeited seniority. The Claimant again did not contact the Carrier or return to service, so on December 2, 2010 the Carrier notified the Claimant that he had forfeited all seniority rights. The Organization filed an appeal on behalf of the Claimant on December 2, 2010, contending that the loss of seniority was inappropriate because the Claimant was still undergoing treatment and thus the action was a violation of the discipline agreement. On October 28, 2012 the Claimant filed a complaint under the Federal Employee Liability Act (FELA) in relation to his knee injury and received a monetary judgment from the court. On July 19, 2013, the Carrier advised the Organization that the Claimant was not permitted to return to work. The Carrier's position is that it believes the Claimant testified in court action that he was permanently unable to work in his current position. The Organization disagrees with the Carrier on this point, arguing the testimony does not reference permanent disability.

The Carrier contends the Organization has not met its burden of proof in showing the Claimant's loss of seniority is in violation of the agreement. The Carrier alleges the Organization must meet a heightened evidence standard consistent with a "preponderance of probative evidence." It is the Carrier's position that the Claimant's seniority has been properly forfeited under Rule 38 of the agreement. Rule 38 compels employees to either return to work or provide sufficient evidence to the Carrier that they are unfit for service within 10 days. In support of this position the Carrier provides a large list of 200 employees within the past 5 years who provided the requested documentation under Rule 38 and 11 employees who failed to do so and thus forfeited their seniority (see Carrier Exhibit A, pages 18-24). Thus, the Carrier characterizes the provisions of Rule 38 as "self-executing" and "consistent with past practices." While the Claimant provided some medical documentation in the form of a letter stating he was under a physician's care, the Carrier argues this was insufficient information and that it had specifically requested all medical records related to the injury (see Carrier Brief, pages 9-10). Finally, the Carrier argues that the Claimant is estopped from entering service again due to representations he made in the course of a court case involving his injury. In support of this, the Carrier quotes from the trial transcript where it alleges the Claimant and his physician testified the Claimant would not be able to return to work in his capacity as a Track Repairman (see Trial Transcript, pages 49-50 and 54-56).

The Organization argues the invoking of Rule 38 in this case is inappropriate because it only applies to employees who are laid off via reductions in force. The language of the rule says it applies to "...employees laid off by force reduction...." (see Organization Brief, page 3). As the Claimant in this case was on a medical leave of absence and was not subject to a force reduction, the provisions of Rule 38 do not apply. The Organization notes the Carrier's defense of this rule is under the standard of past practices, which is irrelevant given the clear and unambiguous language of the rule itself (see Organization Brief, page 5). Of the 11 employees who lost seniority under Rule 38 provided by the Carrier, the Organization notes at least one of them has been appealed and is before this Board on the same basis as the instant case. Even if Rule 38 did apply, the Organization argues that it clearly allows employees to respond later than 10 days for

"sickness" or "good and sufficient cause." The Claimant made a good faith effort to protect his seniority by (1) leaving a voice mail with the Carrier to confirm receipt of records he believed had been sent and (2) providing a letter from his physician that he was unfit for work as he had recently undergone knee surgery (see Organization Exhibit A-1). On the matter of whether the legal doctrine of estoppel applies to this case, the Organization contends the Carrier fundamentally misrepresents the trial testimony (see Organization Brief, page 11). In support of this position it argues (see Exhibit A-9) that the Claimant did not declare he could never again work for the Carrier, only that he was currently unable to do so.

The Board finds the Carrier and Organization have two issues to resolve. The first issue is the application of Rule 38, specifically whether the Claimant's failure to respond to the Carrier's letter on November 11, 2010 results in an automatic forfeiture of seniority. The second issue is whether the Claimant is estopped from returning to work because he or his agents made representations in a subsequent legal action about his ability to work as a Track Repairman.

On the first issue, the Carrier offers several previous awards in support of its position that Rule 38 contains what is characterizes as "self-executing provisions" which resulted in the Claimant losing seniority. Of the cases cited by the Carrier, only the facts in PLB 1837 Award 20 are the facts similar enough to those in the instant case to be compelling. In PLB 1837 Award 20, the rule in dispute was Rule 9, which has similar language to Rule 38 in the instant case. In that case, the Claimant was laid off and as such the rule was applicable because it concerned reductions in force (see Carrier Exhibit E, page 1). This case seems the most relevant to the instant set of facts. The Carrier also offers an extensive list of employees who returned to work after being notified under Rule 38 and also offers a list of employees who were dismissed under the policy for failing to respond in the manner specified by the rule. However, the Board takes note of the Organization's position that the clear language of Rule 38 states it applies to "employees laid off by force reduction," a provision of the rule which cannot apply in this case because the Claimant was on a voluntary medical leave of absence. The Board finds the language of Rule 38 to be clear and unambiguous, and as such the rule can only apply to employees who are subjected to force reductions. In reviewing the record, we can find no evidence that the Claimant was on leave due to a force reduction. Therefore, the Board finds Rule 38 does not apply in the instant case.

On the second issue, the Carrier believes the Claimant cannot be allowed to return to work due to estoppel. The evidence that the Claimant is estopped from returning comes from the court transcript of a legal claim brought under FELA. The carrier quotes from portions of the transcript where both the Claimant and his physician testify concerning the Claimant's ability to return to work. The Carrier characterizes this testimony as proving the Claimant stated he could never again return to work in the future and thus is estopped from doing so in the instant case (see Carrier Brief, page 17). The Carrier cites PLB 912 Award 1054 and PLB 1493 Award 10 in support of the idea that Claimants who state they are permanently unable to work for the Carrier are properly considered as estopped from returning to work. The Claimant in the instant case prevailed

against the Carrier in his legal claim, but the Carrier also notes Claimants who have not been successful in similar legal actions have still been estopped from returning to work on the basis of their testimony (see PLB 5935 Award 19 and PLB 2995 Award 62). The Organization does not dispute the basic legal doctrine of estoppel, but rather contends that it does not apply in this case because the Claimant never stated he was permanently disabled and unable to return to work. Instead, the Organization characterizes the Claimant's testimony at trial as only stating that he was currently disabled and unable to return to his Track Repairman position at that time (see Organization Exhibit A-9, page 1-2).

In considering the positions of the Carrier and Organization, the Board has carefully reviewed the transcript, reviewed the cited cases, and reviewed the parties' respective memorandums on estoppel when this issue was brought up on the property. We give great weight to the testimony of the Claimant at trial, who stated he did not believe he could return to work given the condition of his knee (see Trial Transcript, page 56). The Organization contends that this testimony is irrelevant because it is the Claimant's opinion and he is not a medical expert. However, the Claimant chose to answer a direct question about whether he could work given his knee condition at trial. By answering that question in the negative, the Claimant showed he believed he was capable of judging his own capacity for returning to work. In reviewing the trial transcript, the testimony in question does not seem to make a distinction between whether the Claimant believed he could not to work on a permanent basis (as contended by the Carrier) or only could not return to work at that time (as argued by the Organization). Since the question is open for different interpretations of what the Claimant actually meant, the Board can only take the statement at face value that the Claimant believed he could not return to work based on the condition of his knee. As such, the Board finds the Claimant is estopped from returning to his previous position as a Track Repairman with the Carrier.

The claim is denied.

M.M. Hoyman
Chairperson and Neutral Member

D. Pascarella
Employee Member
[DISSENT TO FOLLOW]

D.L. Kerby
Carrier Member
CONCURRENCE & PARTIAL DISSENT IS ATTACHED

Issued at Chapel Hill, North Carolina on May 9, 2014.

CARRIER MEMBER'S CONCURRENCE AND PARTIAL DISSENT
TO
AWARD 239 OF SPECIAL BOARD OF ADJUSTMENT NO. 1049

The matters at issue in the circumstances comprising Award 239 were complex and detailed, required thorough scrutiny and rigorous application of the principles of contract construction, and were vigorously contested by the respective advocates. The resultant Award concisely and accurately reflects the respective principle arguments and correctly applied the doctrine of estoppel, to the specific details as presented, in rendering its finding that the Claimant was estopped from returning to the Carrier's service based on representations made in the plain language of the testimony presented in a trial pursuant to the disposition of a complaint under FELA. The nature and degree of the representations made, regarding the Claimant's condition, at the trial are consistent with the factual examples contained in the arbitration awards that had been submitted specifically to demonstrate the application of the doctrine of estoppel to Railroad industry employees in similar circumstances. Accordingly, the Carrier wholly concurs with the Award in denying the Claimant's claim for reinstatement.

The threshold matter in this issue concerned the Carrier's initial determination that the Claimant had forfeited seniority under a self-executing provision of the agreement. The Award correctly recited the pertinent details of the incident and the parties' respective positions concerning the proper application of this self-executing provision. Had this incident been a case of "first impression," the Award's finding that the self-executing provision "does not apply in the instant case" would not warrant further comment. The Award correctly notes that the past practice evidence presented by the Carrier would not be material in the face of a clear and unambiguous provision; however, the complicated and prolific text of the rule language at issue contains some inherent ambiguity and has a history of having been applied by the parties in a broader fashion than what was perceived here by the Board. In undergoing the interpretive analysis, the Award quite properly pointed to obtaining guidance from arbitration decisions that had been submitted to illustrate application of the self-executing forfeiture of seniority. Unfortunately, the Carrier's presentation of this particular material was not sufficient for the Board to discern that two of the arbitration decisions submitted, both of which upheld the application of the seniority forfeiture to employees represented by the BMWED on this Carrier, actually involved employees who were off work due to illness or injury – circumstances akin to those giving rise to the case at bar – as opposed to being "on leave due to a force reduction." Moreover, the Carrier presentation was not sufficient for the Board to recognize the intricacies in the construction of the rule language at issue, wherein the "laid off by force reduction" adjective clause is contained in a completely separate sentence from the sentence that contains the language regarding a failure to return to service and resultant forfeiture of all seniority rights. Therefore, although the Board undertook the rigorous chore of wrestling with the proper application of the self-executing seniority forfeiture provisions to the particular

details of the Claimant's circumstance, before moving on to its analysis of the doctrine of estoppel to the specific evidence in the record, I must dissent to the finding that the self-executing seniority forfeiture did not apply to the Claimant's case; in that the interpretive analysis was made without the benefit of the understanding that the parties had previously resolved this threshold quandary among themselves and for an extended period the disputes surrounding this particular rule have been focused on whether or not the involved employee fulfilled the obligations under the rule to avoid the forfeiture of seniority, rather than the more fundamental matter of whether or not the particular circumstance falls within the breadth of the rule language.

For all of the reasons set forth above, I heartily concur with Award 239 of SBA No. 1049 in denying the claim; but, dissent to any attempt to subsequently assert that the findings support imposing a new limitation, contrary to the long-standing historical application, on the circumstances for which an employee remains responsible to comply with the respective provisions of Rule 38.

Respectfully Submitted,

D. L. Kerby
Carrier Member, SBA 1049