

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

"Engineer D. Harris, Jr., claims 108 miles per day on a continuing basis commencing November 18, 1988, account the Carrier refusing his request to mark up."

FINDINGS:

The First 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 employes 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 began his employment with Carrier in 1978 and was later promoted to engineer in 1980. The instant case was precipitated when Claimant Harris attempted to mark up as an engineer on November 18, 1988, and his request was denied by the Crew Dispatcher's office. On November 21, 1988, Carrier informed the Organization that Claimant's request to return to work had been denied based upon the fact that Claimant pleaded in court that he was totally and permanently disabled and had been awarded a settlement based upon that claim. He was further denied reinstatement based upon Carrier's contention that he was not physically fit to perform the duties of an engineer.

On February 13, 1986, Claimant alleged that he sustained a back injury while operating a switch engine in the Roper, Utah yard which collided with another train. On May 6, he was released by a Carrier physician to return to work and on May 8, 1986, he was released from the Cottonwood Back Program following his successful completion of a Work Hardening Program. Following his return to work on May 6, 1986, Claimant attempted to increase the number of hours he could work each day without suffering back pain. He was unable to resume a full-time schedule, however, and in July or August, 1986, he laid off due to back pain.

On February 5, 1987, Claimant filed an action under the Federal Employers' Liability Act, and the Boiler Inspection Act, alleging that Carrier's negligence on or about February 13, 1986, had rendered him "sick, sore, lame, disabled and disordered, both internally and externally" following the "severe personal injuries" he received. He alleged that he suffered "severe injuries to his neck and back; excruciating pain and suffering; severe shock to the nervous system; and other serious severe and incapacitating injuries." As a result, he claimed to have suffered a "permanent loss of the full enjoyment of his life." Claimant demanded the sum of \$350,000.00 as a monetary remedy.

A jury trial was held on November 7 and 8, 1988, in the U.S. District Court of Utah. During the trial, Claimant testified that light duty exacerbated his back condition; that even attempting to work 6 hours a day as a locomotive engineer caused severe pain; and that in February of 1988 his physician had determined that his condition was such that he could not return to the railroad in the capacity of a locomotive engineer.

Claimant's treating physician testified that in his opinion Claimant had suffered an injury to a disc in his lower back as a result of the February 13, 1986 incident and that his back problems would prevent him from returning to work with the Carrier due to increased risk of future injury to his back. The physician characterized Claimant's back condition as "permanent," indicating that "this particular level of injury will not ever return to 'normal' or to pre-injury level of physiology."

At the close of the trial, the jury awarded Claimant \$55,869.00 in damages.

Less than two weeks after the trial, Claimant contacted the Carrier's Crew Dispatcher's office by telephone on November 18, 1988, and requested permission to place himself on an engineer's assignment at Roper, Utah. His request was denied. On November 18, 1988, Claimant addressed a letter to the Superintendent requesting permission to exercise his seniority. Carrier refused, and the instant claim was thereafter progressed to this Board for adjudication.

On July 5, 1990, the Organization wrote the Carrier attaching a copy of a U.S. Civil Service Commission Certificate of Medical Examination that was completed at the request of the Federal Railroad Administration as a result of Claimant's request for employment as a Federal Railroad Inspector. The certificate indicated that Claimant was fit to perform the duties of that position. The Organization requested that Carrier have Claimant examined by a Carrier physician to prove that he was physically capable of performing the duties of locomotive engineer. There is no response by Carrier to that request in the record before this Board. The Organization alleges that Claimant was hired by the Federal Railroad Administration as a Railroad Safety Inspector; however, he would prefer to return to work for the Carrier as a locomotive engineer.

Carrier contends that when an employee institutes a cause of action and therein alleges permanent disability, with expert witnesses testifying to that effect in court, that employee by his own action forfeits any right to future employment. In the Carrier's view, that is the precise scenario in the instant case. It argues, therefore, that Claimant is estopped from claiming a right to return to work.

The Organization counters with the argument that Carrier's action in removing Claimant's name from the seniority roster and denying him the right to return to work constitutes a violation of the collective bargaining agreement. It asserts that Claimant's testimony at trial was simply a matter of opinion, not a matter of fact, and that this also holds true for the opinion of Claimant's physician at the time of trial. The testimony adduced was based on the information available at the time, the Organization stresses, but no one could have known or predicted that Claimant would forever be unable to recover.

The Organization further argues that the medical record given the Carrier from the U.S. Civil Service Commission should have been considered and that, based upon that information, Claimant should have been examined by the Carrier physician and returned to work.

This Board has carefully considered the arguments of the parties as well as the plethora of precedent Awards cited and the various decisions of the courts which have been referenced. It is our view that Carrier acted properly in denying Claimant's request to return to work. The majority of Awards we have reviewed apply the doctrine of estoppel when: a claimant is allegedly injured on-the-job and files a claim and/or a lawsuit against the Carrier under the Federal Employers' Liability Act; Claimant represents himself as being incapable of resuming his former occupation; relying on testimony of the Claimant, his medical expert, or the representations by his attorney during the proceedings, he is awarded a monetary judgment. See, e.g., PLB 1735, Award 1 (1976); PLB 1917, Award 14 (1981); Second Division Awards 11621; 11641; 7976; Third Division Awards 23820; 27302; 6215.

Such is the scenario in the case at hand. Claimant asserted in a judicial proceeding, and introduced evidence tending to prove, that he was unable and would be unable to resume his occupation or employment with the Carrier. He claimed damages and thereafter recovered a verdict based upon those representations. It is our view that Carrier's conclusion as to Claimant's physical disqualifications, predicated on the representations at the judicial proceeding, and its refusal to reinstate the Claimant under such circumstances, was not arbitrary or capricious. Claimant is estopped from now asserting in this forum that his physical condition is inconsistent with that upon which his trial verdict was based. As noted by the Board in PLB 1493, Award 10, "In effect, the doctrine of estoppel says, 'You can't have it both ways. You either are or you are not.'"

Furthermore, we are unimpressed with the Organization's assertion that the testimony given by Claimant and his expert at trial were merely opinions, or that the small size of the verdict suggests that the jury did not take into account future lost earnings. The critical issue is what the employee contended at the time of the trial, as the vast majority of Awards on this subject so indicate.

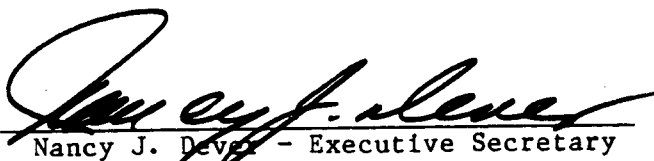
Accordingly, we conclude that Carrier had a sound basis for not allowing Claimant to mark up for duty when he requested to do so. Carrier was entitled to rely on the assertions advanced by Claimant and the medical testimony presented on his behalf that his injury to his back permanently disabled him from working as a railroad engineer.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of October 1991.