

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (K. G. Wilson
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(Louisville and Nashville Railroad Company

Dispute: Claim of Employs:

"Request that Carman K. G. Wilson be restored to service with pay for all time lost subsequent to November 19, 1980. Carman Wilson #327741 was out of service due to an on duty injury, sustained on October 19, 1976. The claims is (sic) also subject to the provisions of Article V, Section (a) of the May 20, 1955 Agreement in that Foreman F. E. Byrd failed to reply to the Local Chairman's claim for pay dated January 28, 1981. Boyles Shops, Birmingham, Alabama."

Findings:

The Second 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, Mr. K. G. Wilson, began his employment with Carrier in Birmingham, Alabama, on August 26, 1970. He established seniority as a journeyman carman on June 3, 1975.

While working as a carman on October 19, 1976, Claimant sustained an injury on the job which required surgery. Subsequently, Claimant brought suit against the Carrier alleging that he was permanently disabled and would never again be capable of working as a railroad carman. The jury awarded Claimant \$100,000. That award included lost wages and potential lost earnings. The Carrier paid the judgment on June 29, 1979.

On October 24, 1980, Claimant showed up at the Master Mechanic's office with a doctor's statement returning him to work. Claimant requested that he be given a return-to-work physical examination. The Carrier denied this request.

The Organization subsequently appealed the decision through all of the channels, and the appeal was denied at every level.

The Carrier argues that the Claimant has received from the jury full compensation for permanent disability and future loss of wages resulting from his permanent inability to perform the duties of carman with the Carrier. Therefore, contends the Carrier, Claimant is forever estopped from claiming a right to perform carman's duties with the Carrier.

This Board has reviewed the Claimant's request and has determined that it must be dismissed. The record shows that Claimant, K. G. Wilson, has failed to comply with the procedures for the presentation of a claim before this Board, as stated in Circular No. 1, issued October 10, 1934. Accordingly, this Board has no alternative but to dismiss this claim.

Without receding from the above, in Second Division Award No. 7976, this Board denied a claim of a carman who was injured on duty and thereafter received a judgment of \$85,000 after testifying during the trial that his injuries were permanent and that he could not perform the arduous duties of a carman anymore. The Board in that case cited a decision by the United States Court of Appeals which states:

"A plaintiff who has obtained relief from any 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 early contentions. Such use of inconsistent positions would most flagrantly exemplify that playing fast and loose with the courts which has been emphasized as an end the courts should not tolerate."

This Division also stated in Award 1672:

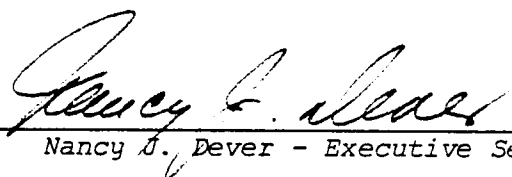
"It is not a violation of the agreement to bring suit against the carrier to recover damages against the carrier. But when the employee alleges permanent disability resulting from injury and pursues that claim to a final conclusion and obtains a judgment on that issue, he has legally established his permanent disability and the carrier is under no obligation to return him to service..."

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1984