

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

Parties to Dispute: ( (Sheet Metal Workers' International Association  
(Southern Pacific Transportation Company  
(Western Lines)

Dispute: Claim of Employes:

That claimant Rudolfo Comparan be compensated for all lost wages. Return to service with all seniority rights. Make claimant whole for all vacation rights. Pay the premiums for hospital, surgical and medical benefits for all time held out of service. Pay the premiums for group life insurance for all time held out of service. Said claim to begin 12-14-84 and continue until it is satisfactorily disposed of in its entirety. In addition to the money claim herein, the Carrier shall pay claimant an additional amount of 6% annum compounded annually on anniversary date of claim.

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 had been in active service of the Carrier for about ten years. On August 15, 1981, he suffered a personal injury while on duty. Claimant later filed suit against the Carrier seeking \$630,000.00 in damages. In March, 1983, the Jury rendered a verdict of \$140,000.00 to be paid to Claimant.

On February 10, 1985, the Local Chairman of the Organization submitted a Claim to the Plant Manager of Carrier's Locomotive Maintenance Plant at Los Angeles, contending that Claimant was being unjustly withheld from service by the Carrier for allegedly being physically disqualified for service. The Claim submitted by the Local Chairman was substantially the same as submitted to this Board. On March 19, 1985, the Claim was denied by the Plant Manager.

The Organization contends that on May 8, 1985, the General Chairman, by "Certified Mail - Return Receipt Requested," appealed the Claim to Carrier's highest designated officer of appeals; that on May 15, 1985, the General Chairman requested a conference on May 30, 1985, to discuss the Claim in behalf of Claimant, along with two other Claims; that on May 23, 1985, the Carrier's highest designated officer of appeals advised the General Chairman that he was unable to find any record of a Claim being filed on behalf of Claimant, and stated that if a Claim had been filed, he (Carrier's highest designated officer of appeals) would appreciate a copy of it. On May 28, 1985, the General Chairman responded by furnishing a copy of the entire file, a copy of his letter of May 8, 1985, and a copy of Return Receipt for Certified Mail showing delivery to the Carrier of the documents on May 10, 1985. On August 16, 1985, the Carrier's highest designated officer of appeals responded to the General Chairman, referring to discussions, stating that he had not received the initial Claim; that the statements furnished by Claimant's doctors placed certain restrictions on the work to be performed by Claimant; that the Carrier's Chief Medical Officer evaluated the restrictions placed on Claimant's services were permanent; that there was no job available to Claimant, on the basis of his seniority, that could be accomplished with the medical restrictions placed on his services; and that Claimant was estopped from returning to work by virtue of receiving a large settlement as a result of a Court Trial, in which it was alleged by Claimant, or alleged on his behalf, that he would never be able to return to railroad work. The Carrier also contended that the Claim was not timely filed initially.

It was also contended by the Organization in the on-property handling that the Agreement was violated by the Carrier as the appeal of the General Chairman was not disallowed within sixty days. The Organization also contended on the property, and continues such contention before the Board, that under Rule 26, captioned Faithful Service, Claimant was entitled to return to work.

The contentions of the parties before the Board are substantially the same as on the property.

Before discussing the merits of the dispute, the Board must dispose of the time limit contentions raised by the parties. The record is clear that the Carrier did not deny the Claim appealed by the General Chairman within sixty days. We accept the Certified Mail Return Receipt, furnished by the General Chairman, as evidence that appeal was delivered to the Carrier on May 10, 1985. It showed a postal stamp of delivery on that date, and was signed by someone representing the Carrier, showing that it was received in the Carrier's mail room. If some breakdown existed between Carrier's mail room and the Labor Relations office, that could not properly be charged to the Organization. It is noted that following receipt of the General Chairman's letter of May 28, 1985, the Carrier did not respond until August 16, 1985, far in excess of sixty days. We find that the Carrier was in violation of the Time Limit Rule.

The question then arises as to the remedy for Carrier's violation of the sixty-day provision of the Time Limit Rule. In recent Second Division Award No. 10754, the Board cited many precedent decisions holding that a late denial is effective to toll Carrier's liability for the procedural violation as of that date. Among the precedent decisions cited were Decision No. 16 of the National Disputes Committee, Second Division Awards Nos. 4853, 6370, Interpretation No. 1 to Second Division Award No. 6326, and Third Division Awards Nos. 24298 and 25417. We find that the proper measure of damage for Carrier's violation of the Time Limit Rule is compensation for Claimant at his straight time rate from December 14, 1984, through August 16, 1985. Allowance of this portion of the Claim on the time limit issue has no effect on the merits of the Claim.

On the record before us, we find no support for Carrier's allegation that the Time Limit Rule was violated by the Organization.

As to the merits of the dispute, we must first consider the doctrine of estoppel as raised by the Carrier in the on-property handling, and relied upon by the Carrier in its Submission to this Board. The different Divisions of the National Railroad Adjustment Board, as well as Public Law Boards have issued numerous Awards involving the doctrine of estoppel. Third Division Award No. 23830 cited Award 10 of Public Law Board No. 1493, Awards Nos. 1 and 2 of Public Law Board No. 1716, First Division Award No. 20166, Second Division Awards Nos. 1672, 5511, 6129 and Third Division Award No. 6215.

In support of its contention as to the applicability of the doctrine of estoppel the Carrier has submitted a Transcript of the testimony of Claimant's principal treating physician in Claimant's F.E.L.A. suit in United States District Court, Central District of California, on March 3, 1983, in which the doctor testified that Claimant had been disabled from his usual work until that time, and it was his opinion:

"That the patient should retrain through the services of rehabilitative training, and this is based on my given knowledge of the patient's job description and the extent that I understand it."

The doctor went on to testify:

"I believe his condition is chronic and I don't see it changing in the near future."

The Carrier asserts that in view of the testimony offered and the judgment of \$140,000.00 in favor of Claimant, the Claimant was and is estopped from returning to Carrier's service. The Carrier also offers in support of its position Award No. 6 of Public Law Board No. 1917 and Award No. 9 of Public Law Board No. 1198. Court documents and Awards of Public Law Boards are matters of public record, and, as such, are admissible in proceedings before this Board at any time.

After a careful review of the entire record, we find, on the merits of the dispute that the doctrine of estoppel is applicable and that Claimant is estopped from returning to the service of the Carrier. In Third Division Award No. 23830 numerous Court cases were cited upholding the doctrine of estoppel. The Award went on to hold:

"The Carrier has also cited numerous Board Awards, and Public Law Board Awards following the decisions of the courts. Among those cited are Award 10 of Public Law Board No. 1493; Awards 1 and 2 of Public Law Board No. 1716, First Division Award 20166, Second Division Awards 1672, 5511, 6129, and Third Division Award 6215. We think that Third Division Award No. 6215 accurately sums the matter up.

'The basic philosophy underlying these holdings is that 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. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy.'

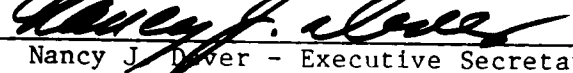
We will follow Award No. 23830 (Third Division) and deny the merits of the dispute on the doctrine of estoppel.

The Claim will be sustained only to the extent of awarding Claimant compensation at his straight time rate from December 14, 1984, through August 16, 1985, as previously indicated. In all other respects the Claim will be denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1987.