NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29780
Docket No. MW-30000
93-3-91-3-387

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
((Amtrak) - Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to allow B&B Mechanic R. Weegan to return to active service on January 17, 1990 (System File NEC-BMWE-SD-2692 AMT).

(2) The claim as presented by District Chairman B. Wesley on January 18, 1990 to Division Engineer A. Fazio shall be allowed because said claim was not disallowed by Division Engineer A. Fazio in accordance with Rule 64(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the claim shall be allowed as presented in accordance with the provisions of Rule 64(b) or Rule 73(h)."

FINDINGS:

The Third 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 employe 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 were given due notice of hearing thereon.

The Claimant in this case entered Carrier's service in 1977. In July 1984, while in Carrier's employ, Claimant sustained an on-duty personal injury, which resulted in the surgical removal of Claimant's right kneecap. During his progression of a court action for recovery of damages under the provisions of the Federal Employees Liability Act (FELA), Claimant, through the testimony of his physician, argued that he had suffered permanent damage. His physician testified that "- he will not be able to do that work any more." Carrier stated, without contradiction, that in settlement of this FELA action, the jury awarded Claimant the sum of $466,000.00 in settlement for past and future damages. The award was reduced by the jury to $113,434.32 based upon its finding that Claimant was 65% responsible for the injury. Carrier made payment to Claimant of the above mentioned $113,434.32 in settlement of its 35% liability in the action. The release was signed by Claimant on March 9, 1987.

Subsequently, on January 17, 1990, Claimant presented himself to Carrier's officers, along with a copy of a "General Basic Medical Examination Record" from the New York State Education Department, Office of Vocational Rehabilitation signed by a Rehabilitation Counselor and dated February 6, 1989, which allegedly indicated that Claimant had been examined and found to be normal in all physical aspects as indicated on the form. There was no medical report accompanying this form, nor was there any indication to explain the time lapse between the issuance of the form and the presentation of it to the Carrier. On January 17, 1990, Claimant requested that he be returned to Carrier's service. Carrier refused to permit Claimant to return to service.

By letter dated January 18, 1990, a claim was initiated by the representative Organization on Claimant's behalf alleging that Carrier had violated Rule 22 of the Agreement when it refused to permit Claimant to take a return-to-duty physical examination. This claim was postmarked January 22, 1990, and was received in Carrier's general mail room facility on January 30, 1990. The claim was eventually received by the officer to whom it was addressed on February 2, 1990. Carrier's officer denied the claim by letter dated March 30, 1990, postmarked April 2, 1990.

There is a threshold issue in this dispute which must be addressed before any consideration can be given to the merits arguments. The Organization contends that Carrier violated the provisions of Rule 64 of the Agreement which sets forth time limits for the handling of claims. The Organization says that inasmuch as these time limits were exceeded by the Carrier, the claim must be allowed as presented. Carrier, of course, insists that its denial of the claim was timely issued and Rule 64 was not violated.

Rule 64 - CLAIMS FOR COMPENSATION - TIME LIMITS FOR FILING reads, in pertinent part, as follows:

> "(b) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the designated officer of AMTRAK authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim is based.
>
> Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative), in writing, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances."

In its argument before the Board, the Organization pointed out that the same time limit issues which are present in this case were also involved in another dispute between these same parties which had been listed with this Board as Docket MW-28204. This other similar claim was, in fact, reviewed by the Board and was decided in Third Division Award 29259. In that Award, the Majority ruled that on this property, a claim is not "presented" until it is received by the Carrier official designated to receive claims. In that Award, the Board held:

> "After careful consideration of the issue, we find Second Division Award 8268 directly on point. Citing a long line of earlier precedent Awards, the Board concluded that it is the date of receipt by Carrier's designated official that is determinative for the purpose of calculating timely disallowance of the claim. We concur with that view, as it is our opinion that any other conclusion would render superfluous the specific language of Rule 64 which requires that claims be presented 'to the designated officer of Amtrak authorized to receive same ....' Accordingly, we find that the claim was timely disallowed."

One of the purposes of this Board is to render with finality on disputes between the parties. In any adversarial situation,

there must be a point where disputes are finally settled. We have examined the fact situation in this case and have compared it to the situation which brought about Award 29259. We find them to be very similar in nature. Whether we would have ruled in the same manner as the Board did in Award 29259 is of no impact or consequence. The fact is that Award 29259 reviewed and decided that in situations such as existed there and as exist here, under the language of the parties' negotiated Rule 64, the measure of time within which the Carrier must deny a claim is calculated from the date of receipt by Carrier's designated official. Award 29259 has not been shown or proven to be palpably erroneous. Therefore, we accept Award 29259 as dispositive of the time limit argument in this case with the dicta that if this measure of time is not acceptable to the parties, then a correction of the situation should be achieved at the bargaining table rather than through arbitration.

The Organization, both during the on-property handling of this dispute and before the Board, has argued that (1) the Carrier's decision to refuse Claimant's return to service was made without support of medical documentation and without benefit of an examination of Claimant by Carrier's medical personnel; (2) that the medical opinions as expressed by Claimant's medical expert during the FELA trial were outdated and invalid at the time of Claimant's attempted return to service; (3) that the Carrier's reliance on the doctrine of estoppel was misplaced because estoppel is a defense based upon equity and this Board may not make decisions on the basis of equity; and (4) that Carrier, in its ex parte Submission to this Board, introduced new evidence in the form of excerpts from the court transcript of the FELA trial proceedings.

Carrier argued throughout its handling of this dispute that there was no violation by Carrier when it refused to have Claimant examined when he presented himself for reemployment because the estoppel principle clearly applied to the situation here present in light of Claimant's pleadings, his medical expert's testimony at the FELA trial and the jury's award for past and future damages.

Both this Board and Courts of various jurisdictions have had many opportunities to review and make decisions on arguments and contentions dealing with the subject of estoppel. For example, in Scarano v. Central RR of New Jersey (203 F2d 510) we read:

> "A plaintiff who has obtained relief from an 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."

See also Jones v. Central of Georgia (331 F2d 649), Wallace v. Southern Pacific Company (106 F. Supp. 742), and Buberl v. Southern Pacific Company (94 F. Supp. 11).

And again, in Third Division Award 6215, this Board held:

> "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."

Many other Awards have been issued by this Board on the subject of estoppel which have addressed the principle from practically all conceivable angles. Our review of the record in this case reveals that most, if not all, of the arguments advanced by the Organization here were advanced, argued and rejected in Third Division Award 29429 which involved the same Organization as is involved in this case. There is no compelling need to repeat here the clear, logical determinations which were set forth in Award 29429. Rather, we incorporate Award 29429, by reference, in our decision in this case. Further support of this decision can be found in Third Division Award 28396 which resolved a dispute between the same parties as are involved in this case.

The single issue in this case which was not argued in Award 29429 is the objection by the Organization to the introduction of new evidence as it relates to the Carrier's inclusion in its ex parte Submission of excerpts from the FELA trial record. That contention too must be rejected for the reason that Court documents are matters of public record, and, as such, are admissible in this Board's proceedings at any time during the handling of the dispute.

The relative convincing force of evidence in this record, coupled with the compelling nature of the authorities presented on this subject of estoppel, permits only one conclusion in this case. That is, that this claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin sb
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.