

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (Burlington Northern Railroad Company
(United Transportation Union

STATEMENT OF CLAIM:

"Claim of Burlington Northern Railroad Company that the claim of J. M. Bovee, for '...pay for all time withheld from Job WBT R-1 as Helper beginning on August 17, 1989, and for all subsequent days until allowed to physically return to service', is without merit."

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 were given due notice of hearing thereon.

The Claimant entered the Carrier's service as a Brakeman on September 21, 1970. On January 9, 1987, the Claimant suffered an on duty injury. On July 8, 1987, a Federal Employer's Liability Act (FELA) action was filed on the Claimant's behalf against the Carrier in U. S. District Court in Portland, Oregon. The complaint asked for a judgment of \$750,000. asserting that the Claimant had:

"...suffered total disability for an extended period of time, permanent disability, great pain, suffering, anxiety, diminution of earnings capacity and partial loss of his enjoyment of living, and continuing wage loss and medical expense, all of which conditions are permanent in nature."

The original complaint was amended on April 21, 1988, to \$1,500,000.

The trial was conducted on May 24, 25 and 26, 1988. The jury rendered a verdict in favor of the Claimant and awarded him \$670,000. The jury reduced that amount by 25 percent, which represented the Claimant's contributory negligence, and thus the net verdict reached by the jury was \$502,500.

Subsequent to the verdict in favor of the Claimant, the Carrier filed an appeal. On March 30, 1989, the Claimant and the Carrier entered into a negotiated settlement for \$475,000.00 prior to any determination on the Carrier's appeal.

The Carrier's "Release of all Claims" form dated March 30, 1989, contained printed language as well as typed language inserted in open spaces by the Carrier's representatives. The portion typed in blank spaces on the form stated in part:

". . . and in further consideration of this settlement, it is understood the injuries I, James M. Bovee, have sustained will forever and permanently disable me from returning to work for Burlington Northern Railroad Company, and I hereby release any claim or right which I may have to return to employment with Burlington Northern Railroad Company."

was stricken through and initialed by J. M. B. (James M. Bovee).

A second portion of the printed form reading:

", and includes any claim I may have for time lost."

was likewise stricken through and initialed by J. M. B. (James M. Bovee).

The release was then signed and accepted by both Claimant and the Carrier as altered and initialed by Claimant and dated March 30, 1989. And a check was issued for the amount of \$460,270.51 which reflected a deduction of \$14,729.49, owed to the Railroad Retirement Board, from the \$475,000 settlement figure.

Four months later the Claimant attempted to mark up for service after presenting a release from Dr. Lawrence Franks, that he was released to return to work as follows:

"July 24, 1989

TO WHOM IT MAY CONCERN:

RE: James Bovee

Mr. Bovee is released to return to work with no medical restrictions, effective on Tuesday July 25, 1989. This is to include full responsibilities as a brakeman. Further information may be obtained from this office upon request.

LAWRENCE J. FRANKS, M.D."

the Claimant was not allowed to return to work. The instant claim now before this Board was first submitted on August 17, 1989. The matter was progressed on the property up to this Board, and it is now properly before us for adjudication. All of the records from the on-property handling are before this Board and have been duly considered.

From the record before this Board, it is clear that the Claimant's FELA law suit alleged that he suffered permanent disability and ". . . continuing wage loss and medical expenses, all of which conditions are permanent in nature" as set forth in the Complaint. The Claimant himself testified that he "had continuous pain," like a backache, varying in intensity such that: "If I rotate my body one way or the other, or bending will intensify it, or reaching for something will intensify the pain." The Claimant testified that he had trouble bending, getting his shoes and socks on. He testified that he could not hold his five month old granddaughter more than five minutes.

The Claimant's physician, Dr. Franks testified in part:

"A I'VE TALKED WITH MR. BOVEE ABOUT -- I'VE ASKED HIM TO DESCRIBE WHAT HE DOES, AND HE DESCRIBES HIS WORK AS A BRAKEMAN IN -- IN WHAT YOU JUST SAID. HE HAS TO JUMP OFF AND LAND ON SOMETIMES IRREGULAR SURFACES, AGAIN WITH THIS POUNDING. I DON'T THINK HE'S GOING TO TOLERATE THAT. I THINK HE'LL HAVE TOO MUCH PAIN WITH IT, BE LAID UP, TIME LOSS, THE WHOLE SCENARIO AGAIN. I'M NOT IN FAVOR OF IT."

(Emphasis added)

A vocational rehabilitation counselor testified as part of the Claimant's case that based on the medical information in the file, the physician limited him to sedentary work. This witness testified in part:

"A Based on the medical information in the file, the physician is limiting him to sedentary work. And when I took the jobs that he had done and compared the aptitudes that were required, how heavy the job was, whether it was skilled or not, I was unable to find any occupations for which he could transfer -- directly transfer skills he already had acquired into a sedentary position.

I then began to look for light jobs. Sedentary positions are generally considered as jobs where he's not required to lift more than ten pounds, very little walking, and so on. So I then began to look at light jobs which are defined as in the twenty pound range.

There were six occupations that might be considered for transferable jobs. However, those occupations were not readily available in the local market. They were jobs such as car inspector, loading inspector, hatch tender, battery inspector.

Of those occupations that did exist in the local market, when I checked labor market information, I found that the wage paid an average of five to six dollars an hour and that there were large numbers of persons unemployed in those fields. So that even if he were considered to have the necessary skills, the chances of him being employed were very, very small because of a very poor labor market."

(Emphasis added)

In his closing argument, the Claimant's attorney stated in part:

"NOW, IF THERE IS TO BE SAID THAT THERE'S A THEME IN THIS CASE OR A MORAL TO BE LEARNED AS A RESULT OF THIS TRIAL, IT'S THIS, THAT FOR WANT OF ORDINARY HOUSEKEEPING ON THE PART OF THE RAILROAD, JAMES BOVEE WAS INJURED AND WAS DEPRIVED OF HIS LIVELIHOOD." (Emphasis added)

He pointed out that the medical evidence showed that the Claimant could only perform sedentary work, and, as to the Claimant's ability to do the work of a railroad brakeman, his attorney stated in part:

". . . DON'T TAKE MY WORD FOR IT. TAKE WHAT THE BURLINGTON NORTHERN ITSELF HAS SAID IN THAT PARTICULAR REGARD.

AND THEY WILL TALK TO YOU ABOUT THE WEIGHTS THAT HAVE TO BE LIFTED AND WHAT THEY HAVE TO BE DOING WITH THOSE WEIGHTS, AND THEY HAVE TO PUSH AND THEY HAVE TO PULL AND WHAT KIND OF A JOB THIS IS. PRIMARILY UNDER EACH -- THERE'S MANY DIFFERENT ITEMS HERE. AT THE END THERE'S A BRIEF DESCRIPTION. AT THE END IS THEIR CONCLUSION AS TO WHAT IS INVOLVED.

THAT INVOLVES, LADIES AND GENTLEMEN, A VERY FIT INDIVIDUAL, AND THAT CANNOT BE DONE BY MR. BOVEE NOW. DR. FRANKS AND DR. DINNEEN BOTH AGREE TO THAT.

(Emphasis added)

Further, the Claimant's attorney also presented to the jury the Claimant's position on loss of earning capacity, and loss of benefits as a result of the injury:

"MULTIPLY -- HE'S GOT NINE YEARS TO GO TO AGE 65. HE'S GOT 14 YEARS TO GO TO AGE 70. THESE ARE THE TWO FIGURES, 371,000 IF YOU LOOK AT AGE 65 AND 578,200, IF YOU LOOK AT AGE 70. AS WE KNOW, THESE NUMBERS REALLY CAN MULTIPLY WHEN YOU START THINKING ABOUT IT.

OR WHAT IF HE GETS A JOB AT \$6 AN HOUR? NOW, THERE IS NO EVIDENCE HE'S GOING TO GET A JOB AT \$6 AN HOUR. BUT I WANTED TO USE THOSE FIGURES TO HELP YOU TO CONSIDER -- MAYBE YOU FEEL AS THOUGH HE WOULD BE ABLE TO GET A JOB AT \$6 AN HOUR.

I HEARD TESTIMONY WITH RESPECT TO \$5, AND I THINK I MAY HAVE HEARD SOMETHING ABOUT \$7. I'M NOT ENTIRELY SURE. MY NOTES WERE NOT GOOD, AND I'LL LEAVE IT UP TO YOUR RECOLLECTION. YOU MAY WANT TO IGNORE THIS FACTOR IF YOU FEEL AS THOUGH MR. BOVEE IS NOT GOING TO BE GAINFULLY EMPLOYED.

IF YOU FEEL AS THOUGH MR. BOVEE IS GOING TO GO OUT THERE INTO THE WORK MARKETPLACE WHEN HE'S THROUGH WITH THE PAIN CLINIC AND PRESENT HIMSELF AS A 57 YEAR OLD WITH A TWICE INJURED -- TWICE OPERATED BACK AND GOING TO BE ABLE TO PICK UP A JOB OF ANY KIND AT ALL -- BUT ASSUMING HE COULD GET A JOB AT \$6 AN HOUR AND SAY HE COULD GO RIGHT OUT TODAY AND DO IT, MAY 30.

I FIGURE AT \$6 AN HOUR, 40 HOURS A WEEK, THAT'S \$12,480 A YEAR. SUBTRACTING THAT FROM THE \$41,300, WHICH WE KNOW HE WAS ABLE TO EARN BEFORE HE WAS INJURED ON THE JOB, YOU GET A YEARLY LOSS OF \$28,820."

In his rebuttal remarks, he told the jury in part that:

"BECAUSE HE WENT OUT THERE AND HE PERFORMED THE DUTIES OF A RAILROAD BRAKEMAN ON JANUARY 7 AND JANUARY 8, 1987, AND UP TO 6:00 OR 6:30 IN THE MORNING ON JANUARY 9, 1987, WHEN HE WAS RENDERED DISABLED, AND HE WASN'T ABLE TO DO IT ANY MORE."

(Emphasis added)

In the Claimant's appeal brief, the Claimant's attorney stated in part:

"As will be discussed later, plaintiff experienced the onset of a serious back injury which ultimately required two surgeries, and which made it impossible for him to continue in his railroad employment.

Due to the severe nature of his injury, plaintiff was rendered physically incapable of continuing his work as a brakeman for the defendant railroad. Testimony to this effect was offered by physicians called by both plaintiff and defendant. As a result of his age and his not inconsiderable income from the railroad (\$41,300 in 1986), and the considerable fringe benefits he would have received had he continued to work for the railroad, plaintiff suffered not only severe bodily injury, but significant financial injury as well." (Emphasis added)

We find that the Claimant's case presented at trial on his behalf was that of an individual who was permanently disabled and would be unable to work again as a railroad brakeman. We find that the jury's award took into account and duly awarded him damages based on his loss of future earnings as a railroad brakeman, and that such compensation substantially continued in the \$475,000 settlement of this case. The fact that the Claimant deleted the language from the release does not require that the Carrier return him to service. The release signed by the Claimant did not affirmatively state that the Claimant had a right to return to employment. Nor did the Carrier ever waive its right to assert estoppel against the Claimant's return to work. In fact the release stated:

"NO PROMISE OF ANY KIND HAS BEEN MADE TO ME IN CONNECTION WITH THIS SETTLEMENT."

This Board then is left to a study of the records relating to the FELA law suit to determine if the doctrine of estoppel is applicable to the Claimant's claim that he is now physically qualified and thus has a right to return to work as a railroad brakeman. Based on the evidence of record, we find that the Claimant is estopped to assert that he is now physically able to return to work, when he obtained a very sizable settlement of his FELA case based in part on the position at his trial that he was permanently disabled and incapable of doing railroad brakemen's work in the future.

A W A R D

The position of the Carrier is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of August 1992.