Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28217
THIRD DIVISION Docket No. SG-27874
89-3-87-3-597

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(The Long Island Rail Road Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Railroad Company (LI):

On behalf of L. Saunders for restoration of his name to the Seniority Rosters on the Long Island Railroad as it was on October 1, 1986, account of Carrier violated the current Signalmen's Agreement, as amended, when it, without cause, removed his name from all of its applicable Seniority Rosters on the Long Island Railroad and thereby deprived him of rights and benefits under the current Agreement. Carrier file (L. Saunders)."

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 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.

Claimant was employed as a Cable Splicer by the Carrier in a craft or class of employees represented by the Organization. On December 14, 1982, while working in a manhole on Atlantic Avenue in the Borough of Brooklyn, Claimant was struck and severely injured by a Consolidated Edison Company (ConEd) vehicle. Claimant suffered a punctured lung in addition to multiple severe injuries to his head, neck, back, ribs, right eye and right knee.

The Carrier paid Claimant sick pay benefits and medical expenses for his lengthy hospitalization, surgery and convalescence. The record contains a document dated February 9, 1983, which Claimant apparently executed, under conditions not indicated on the record, purporting to assign to the Carrier any compensation for lost earnings and medical expenses recovered or recoverable in claims or lawsuits arising out of the December 14, 1982, accident.

The jurisdiction of this arbitration board is limited to determination of disputes arising out of the interpretation and application of the Collective Bargaining Agreement between the Carrier and the Organization. Therefore, aside from mentioning its existence in this record, we neither express nor imply any findings regarding the validity, force or effect of the purported assignment document.

On March 18, 1983, Claimant commenced a personal injury lawsuit against ConEd and its truck driver, seeking $2 million in damages. ConEd impleaded Carrier as a third party on July 12, 1983. Nearly two years later, on May 17, 1984, Claimant filed an FELA complaint against Carrier and the Carrier impleaded ConEd as a third party in that FELA action. By order of the Supreme Court, County of Queens, the personal injury action and the FELA complaint were docketed for a single trial.

At the trial, an orthopedic surgeon, a neurosurgeon and a psychiatrist all testified as expert witnesses for Claimant. They unanimously testified that he was totally and permanently disabled from future employment as a Cable Splicer and probably was not trainable for other work. The driver of the ConEd truck also testified regarding his role in the accident. While the case was still in trial, before ConEd or the Carrier had presented any evidence, ConEd made an offer of settlement for $850,000. Claimant and his attorney accepted the settlement from ConEd, and the FELA claim against the Carrier was dropped. On September 30, 1986, the Court approved the terms of the settlement under which ConEd, through its insurance companies, paid the entire $850,000 to Claimant and the Carrier paid nothing. As part of that stipulated settlement, the FELA complaint by Claimant against the Carrier was discontinued without interest, costs, disbursements or payments of any monies by one side to the other. The cross-impleader actions of ConEd and the Carrier also were withdrawn under the same terms. All Parties stipulated that from the $850,000 paid to Claimant by ConEd, the sum of $9,750 would be paid over to the Railroad Retirement Board and the sum of $115,427.34 (representing $104,712.15 for sick leave wage payments and $10,715.19 for medical benefits) would be held in escrow, pending prompt disposition of the Carrier's claim of lien or assignment.

Approximately one week after the settlement of the lawsuit, Carrier's Director of Personnel Relations wrote to Claimant on October 8, 1986, as follows:

> "This will inform you that effective this date your name will be removed from all applicable seniority rosters of The Long Island Rail Road.
>
> I have reached this decision based upon your recent $850,000 settlement for an on-duty injury. If you desire to dispute this determination, arrangements can be made to have a hearing on the issue in accordance with the provisions of your current agreement. In this event, you should contact your labor

organization. However, it is the Carrier's position that you are estopped from returning to service due to this settlement under long-standing principles enunciated by the National Railroad Adjustment Board and Public Law Boards, including Public Law Board No. 3001, Award No. 2.

It is also my obligation to inform you that in accordance with Section 21 of the Sick Leave Allowance Agreement, The Long Island Rail Road asserts a lien for $104,712.15 for wage payments. Pursuant to your assignment of February 9, 1983, The Long Island Rail Road asserts the right to $10,715.19 for medical benefits against your settlement. Your remittance in the amount of $115,427.34 from the funds being held in escrow by your attorney should be forwarded to me immediately.

We are prepared to expedite the arbitration of any issues which you may desire to contest."

Following an appeal hearing requested for Claimant by the Organization's General Chairman, Carrier's Director-Labor Relations announced his decision in the following detailed letter of November 25, 1986, (emphasis in original):

"This refers to your appeal of the above case heard on November 19, 1986. In this case, Claimant was removed from all applicable seniority rosters as the result of his $850,000 settlement for an on-duty injury. At the appeal hearing you protested Carrier's action and requested that he be restored to service, or offered a Board of Doctors. Additionally, you reject the Carrier's assertion of its lien against Claimant's settlement.

A review of this claim and the circumstances involved reveals that Claimant's position is completely without merit. Claimant is estopped from claiming now or in the future that he is capable of performing the duties of a cable splicer, or of performing any other work. During the trial of Claimant's suit against Con Edison and Carrier, his treating psychiatrist Dr. Carl H. Kleban, testified under oath before the Supreme Court of the State of New York on September 24, 1986, Claimant's capabilities regarding reemployment. Note pages 43 and 44 of the transcript:

'Mr. Weitz (Counsel for Mr. Sanders) to Dr. Kleban:

Q. And with a reasonable degree of medical certainty, Doctor, what is the prognosis for Larry Sanders?

A. With a reasonable degree of medical certainty the prognosis is not good. It is poor. Guarded at best.

Q. Those words still have to be defined to us, I don't know what you mean by that?

A. Meaning that in my medical judgment the possibility for significant improvement is slim, is minimal.

Q. Is he disabled from going back to his job as a ?

A. Most definitely.

Q. Cable splicer?

* * *

A. In my opinion, most definitely.'

(Our Emphasis)

Although you maintained that Rule Nos. 32 and 34 of the Agreement maintain that Claimant is entitled to vocational rehabilitation for other employment with the Carrier, medical testimony refutes Claimant's capabilities. Those rules state:

'Rule 32
Disabled Employee -
Placement of And Restrictions from Bidding

(a) By written agreement between the General Chairman and the Carrier a permanently disabled employee holding seniority rights in the Communication and Signal Department may be assigned to any position covered by this Agreement, provided he is capable of performing the service. An employee removed to permit such placement shall exercise seniority, within five days from the date removed, in accordance with Rules 15 and 60.

(b) A permanently disabled employee placed in accordance with paragraph (a) above shall be compensated at the rate of the position to which assigned and may not exercise seniority to advertised positions or vacancies.'

'RULE 34
Temporarily Disabled Employee -
Placement Of, Restriction From Bidding,
Displacement Of

The provisions of Rules 32 and 33 shall also be applicable to employees who by reason of temporary disability are unable to perform their regular duties and shall continue as such employees only so long as such disabling inability continues. By agreement between the General Chairman and the Carrier the disabling condition may be found to be ended, or at the request of either of them, if they do not agree, the provisions of Rule 57 shall be invoked to determine whether the employee's temporary disability has terminated.'

(Our Emphasis)

The above-cited rules refer to an employee 'temporarily disabled,' however, as stated in Dr. Kelban's testimony and other supporting medical evidence, Claimant's condition most definitely is that of a permanent nature.

Dr. Kleban testified further that claimant was not a prospect for rehabilitation even to the extent of working in an office job. Pages 44 and 45 of the trial transcript state:

'Mr. Weitz to Dr. Kleban:

Q. And Doctor, these cognitive deficits, in your opinion, would they constitute a vocational impediment for this man in retraining?
A. Retraining for?

Q. Let's say office work, somebody wanted to give him an office job?
A. Yes in my opinion, they would.

Q. Doctor --

MR. LEONARD: Your Honor, I didn't hear the last answer.

THE COURT: I can't hear you.

MR. LEONARD: I didn't hear the last questions and last answer.

THE COURT: I believe the answer was that he suffers from cognitive deficits to preclude him from being trained for other work, is that what you said, Doctor?

THE WITNESS: Yes.'

(Our Emphasis)

Additional testimony of Dr. Kleban points out the 'permanent' nature of Claimant's disability. Note the pertinent testimony on pages 47-48 of the September 24, 1986 court proceedings:

'Mr. Weitz to Dr. Kleban:

Q. One last question, Doctor. The organic, the brain injury that he suffered you told us defined by this word cerebral concussion is that permanent in nature, is that injury for the rest of his life?

A. I may have to ask you for a clarification. The deficits that he suffered as a result of that injury, many of them are still there. There is no knowing, but they have been there for what is it almost four years which in terms of predictive value makes one think they're going to stay there if they haven't cleared up by now. Sometimes these things clear up quickly within weeks or months, they're still there.

Q. What is, in this case, the reasonable expectation medically?

A. Based on what I just said the reasonable expectation that it's not going to get any better.

Q. He'll have it for the rest of his life?

A. Yes.'

(Our Emphasis)

Concurring medical opinion was supplied by several other doctors. On numerous occasions, Dr. Milford Blackwell, M.D., P.C. examined Claimant and determined that he was permanently disabled. In his reports to the Carrier, Dr. Blackwell stated the following:

'DISABILITY: In my opinion, the patient is totally disabled. He is unable to sustain any substantial, gainful employment.'

(Our Emphasis)

Dr. Fred Mantas, M.D., F.A.C.S., also treated Claimant on various dates and stated the following in his April 25, 1985 memo to Carrier:

'Mr. Larry Saunders is being treated for multiple injuries sustained in a job related accident. He sustained a fracture of the Right clavicle, internal derangement of the right knee, a cerebral concussion fracture of the right humerus, Hemopeumo thorax, sprain of the Lumbosacral spine and Cervical spine.

He is under Psycriatric care and has multiple limb and joint pains, respirator difficulties.

He is totally disabled for work.'

(Our Emphasis)

On May 15, 1984 Claimant was seen by Dr. Morton Marks, M.D. for a comprehensive neurological evaluation. Dr. Mark's June 5, 1984 report states:

'Evaluation and Opinion

. . . He is completely disabled from carrying out his normal occupational activity.'

(Our Emphasis)

Based on the fact that numerous medical doctors have determined that Claimant could never perform the duties of his former position nor be rehabilitated for other employment, Claimant received an $850,000 settlement prior to the conclusion of the presentation of his case, and prior to Con Edison or the Carrier presenting their defense.

Having succeeded through sworn testimony in establishing an inability to ever again perform cable splicer duties or any other work, Claimant is estopped from now or in the future claiming that he is capable of performing those same duties. In this respect note the opinion of the United States Court of Appeals, Third Circuit, in Scarano vs. Central Rail Road of New Jersey, 203 F2d 510 (1953), wherein a case almost identical to Claimant's was litigated. The Court stated, in pertinent part, the following:

> 'The particular facts and circumstances we rely on here are these. Plaintiff asserted in a judicial proceeding, and introduced evidence tending to prove, that he was not able and would not be able to work. He claimed damages for this lost ability to earn wages. As a result of that claim, and by the aid of that judicial proceeding, plaintiff obtained from defendant a sum of money which by its size considering plaintiff's age and earning record, indicates that it was intended to recompense him for his loss of ability to earn wages for at least a substantial future period. Now he asks the same court to hear him on a claim that less than a month after this compensatory recovery he was physically rehabilitated and entitled to be restored to duty and pay status by the defendant on peril of a new compensatory recovery for loss of wages from the date of requested reemployment. Not only does plaintiff find successive claims on inconsistent facts, but he now seeks a duplicating recovery, if we are to respect the legal theory of the earlier claim in settlement of which he received a substantial sum. In these circumstances we think it was proper for the District Court to refuse to allow plaintiff to litigate a claim in contradiction of his earlier position.'
>
> (Our Emphasis)

In a claim that was adjudicated on this property and with your Organization which is similar in fact, Public Law Board No. 3001, in Award No. 2, stated the following:

> 'Referee J. Seidenberg observed in a similar case that "A jury does not award a verdict of a quarter of a million dollars to plaintiffs who are temporarily or casually injured" (Public Law Board 1660, Award No. 21, Case No. 18 involving BRAC and The Long Island Rail Road). Also see Public Law Board No. 1735, Award No. 1, in which Referee A.T. Van Wart, dealing with a pre-trial settlement for $160,000, observed that "The size of the pre-trial settlement was of such substantial nature as to deem that it included therein Claimant's prospective loss of earning capability, with Carrier, for many years to come." So much more compelling is a $670,000 settlement.
>
> Therefore, from the nature of the jury's action and size of the verdict this Board concludes that Claimant is estopped from seeking restoration of employment with Carrier.'
>
> (Our Emphasis)

Likewise, in another award rendered on this property, Public Law Board No. 3543 (SMWIA vs. LIRR) in Award No. 7 ruled on the administrative termination of a Sheet Metal Worker who was injured on Carrier's property and determined to be unable to perform his duties. The jury, in his FELA suit, returned an award in favor of Claimant in the amount of $450,000, which was reduced to $225,000 due to contributory negligence by the employee. Referee Fletcher ruled in the following manner:

> 'There are a number of decisions and awards of various Railway Labor Act tribunals that have concluded that an injured employee is collaterally estopped from urging that he has been wrongfully discharged by a carrier when he was not allowed to return to service following receipt of a monetary verdict in an FELA case wherein the employee, through his attorney and expert medical testimony, persuaded the court and/or jury that he was entitled to compensation because he was permanently incapacitated from performing his regular duties

. . . weight of authority, both arbitral and Federal Court decisions, support a conclusion that it is not an Agreement violation to deny an employee permission to return to service after he has prevailed in an FELA action wherein it was contended that he was permanently disabled as a result of an on-duty injury. What remains to be examined then is whether or not it is an Agreement violation to effect an administrative termination, which constitutes removal of an individuals name from the seniority roster, as was done in the Bates grievance. . . .

* * *

From all of the foregoing it is clear that Adjustment Board and Federal Court decision uniformly hold that an employee is estopped from asserting a right to return to work when the fact circumstances match those of Bates, our Claimant here. Accordingly, when an employee is demonstrably estopped from asserting a right to return to work it is our view that administrative termination is not inappropriate and does not breach just cause standards as contained in the Agreement. The administrative termination of Mr. Bates will not be disturbed.'

(Our Emphasis)

In a recent case adjudicated before the United States District Court, in Barnard Morawa v. Consolidated Rail Corporation and The Brotherhood of Maintenance of Way Employees, #84 - CV - 05194 - DT, 5/30/86, the plaintiff in FELA action was awarded $400,000, reduced by his contributory negligence to $200,000. He subsequently asserted that he was able to work, a position inconsistent with his FELA allegations that he was permanently disabled. The Court said:

'The first issue before this Court is whether the doctrine of judicial estoppel should be applied in a subsequent proceeding when a party has previously asserted an inconsistent position in a previous litigation. The doctrine of judicial estoppel is designed to protect the integrity of the judicial process. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982); Scarano v. Central RR. Co., 203 F.2d 510, 512-13 (3rd Cir.

1953). The doctrine applies to a party who has successfully asserted a position in a prior proceeding and estops that person from asserting an inconsistent position in a subsequent proceeding. Smith v. Montgomery Ward & Co., 388 F2d 291, 292 (6th Cir. 1968), cert. denied, 393 U.S. 871 (1968). See also Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982). As the Supreme Court stated, "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U.S. 680, 689, (1895).'

You also argued that a Board of Doctors should be established in accordance with Rule 57 of the Agreement. Rule 57 provides for the establishment of such a board when there is a question as to the medical condition of the employee. In this case, there is no question. Claimant's own doctors said that he is permanently disabled and the Carrier does not disagree. Therefore, the establishment of such a Board would be unnecessary. It is clear from the sworn testimony of Dr. Kleban and the reports of other doctors, that Claimant suffered a permanent disability as a result of which he would not be able to perform his job duties, or any other work.

In Public Law Board No. 1660, Award No. 21 (BRAC vs. LIRR), Referee Seidenberg ruled:

'The difficulty in complying with the Claimant's request for a Board of Physicians is that there was a full blown court proceeding on the issue of the Claimant's disability and a jury found after hearing competent and substantial medical evidence that the Claimant was substantially disabled. A jury does not award a verdict of a quarter of a million dollars to plaintiffs who are temporarily or casually injured.

The Board finds it fatuous for the Organization to contend that medical opinion offered under oath at a legal court proceeding is not valid proof. . .

> The Board is constrained to note that while the Organization contends on page 13 of its Submission that "medical opinions do not establish permanent disability," it seeks the establishment of a medical board to determine the physical condition of the Claimant. If medical opinions have no evidenciary value, then it is difficult to appreciate the need for a medical board. . .
>
> The Board finds that there is adequate competent medical evidence, which has been evaluated and assessed by a jury empanelled to make such a judgment, to find that the Claimant was disabled to the extent that he could not execute the normal duties and functions of his assigned job. The Carrier was not arbitrary or capricious in removing him after a duly noticed hearing that produced credible evidence to this effect.'
>
> (Our Emphasis)

In Claimant's case, the medical evidence presented by Claimant's own physicians was so overwhelming that the case was settled for $850,000 before it went to the jury.

Your Organization further maintains that there exists no lien against Claimant's settlement. Carrier disagrees. Section 21 of the Sick Leave Agreement states:

> 'In the event that an employee commences any action or proceeding against the Carrier, on the basis of an alleged injury received in the performance of duty for which sick leave allowance hereunder has been paid by this Company then the Carrier shall have a lien against and is entitled to deduct from any recovery or settlement resulting from such action or proceeding up to the extent of the benefits so paid.'
>
> (Our Emphasis)

In accordance with Section 21 of the Sick Leave Agreement, Carrier asserts a lien for $104,712.15 for wage payments. Section 21 provides that the Carrier has a lien against sick leave payments against 'any recovery or settlement' where the employee has commenced any action or proceeding as a result of his injuries. Pursuant to Claimant's assignment of

February 9, 1983, Carrier asserts the right to $10,715.19 for medical benefits against the settlement. Claimant's remittance in the amount of $115,427.34 from the funds being held in escrow by Claimant's attorney is payable to Carrier immediately.

Based on the aforementioned reasons, this is to advise that your appeal is denied in its entirety."

The Claim was not resolved on the property and eventually was bifurcated on appeal to this Board, because the Organization elected to serve notice of intent only on the question of Claimant's asserted right to return to service under Rules 32, 34 and 57 of the Agreement. That Claim is now before us for determination.

The other issue of Carrier's claim of lien or recoupment under Rule 76 was not appealed to the Board by the Organization. However, through his private attorney, Claimant as an individual did bring that aspect of the case to the Board on his own behalf via a separate timely and proper ex parte submission. See Stevens v. Teamsters Local 707, 504 F.Supp. 332 (W. D. Washington, 1980); Patterson v. Chicago and EIR Company, 50 F.Supp. 334 (D. C. Ill, 1943). The latter claim is decided by us in a separate companion decision.

In this Award, we deal only with the Claim for reinstatement to the seniority roster under Rules 32, 34 and 57:

"Rule No. 32 - Disabled Employe, Placement of and Restrictions From Bidding

(a) By written agreement between the General Chairman and the Carrier a permanently disabled employe holding seniority rights in the Communication and Signal Department may be assigned to any position covered by this Agreement, provided he is capable of performing the service. An employe removed to permit such placement shall exercise seniority, within 10 days from the date removed, in accordance with Rule No. 61.

(b) A permanently disabled employe placed in accordance with paragraph (a) above shall be compensated at the rate of the position to which assigned and may not exercise seniority to advertised positions or vacancies."

"Rule No. 34 - Temporary Disabled Employe, Placement of, Restriction From Bidding, Displacement Of

The provisions of Rule Nos. 32 and 33 shall also be applicable to employes who by reason of temporary disability are unable to perform their regular duties and shall continue as such employes only so long as such disabling inability continues. By agreement between the General Chairman and the Carrier the disabling condition may be found to be ended, or at the request of either of them, if they do not agree, the provisions of Rule No. 57 shall be invoked to determine whether the employe's temporary disability has terminated."

"Rule No. 57 - Physical Fitness - Determination of - Board of Doctors

(a) When an employe covered by this Agreement has been removed from his position on account of his physical condition and the General Chairman desires the question of his physical fitness to be decided finally before he is permanently removed from his position, the case shall be handled in the following manner:

(1) The General Chairman shall bring the case to the attention of the Carrier. The Carrier and the General Chairman shall each select a doctor to represent them, each notifying the other of the name and address of the doctor selected. The two doctors thus selected shall confer and appoint a third doctor.

(2) Such Board of Doctors shall then fix a time and place for the employe to meet them. After completion of the examination they shall make a full report in duplicate, one copy to be sent to the Carrier and the General Chairman.

(3) The decisions of the Board of Doctors on the physical fitness of the employe to continue in his regular occupation shall be final, but this does not mean that a change in physical condition shall preclude a re-examination at a later time.

(4) The doctors selected for such Board shall be experts in a disease or injury from which the employe is alleged to be suffering, and they shall be located at a convenient point so that it will be necessary for the employe to travel on a minimum distance and, if possible, not to be away from home for a longer period than one day.

(5) The Carrier and the Brotherhood of Railroad Signalmen of America shall each defray the expense of their respective appointees. At the time the report of the Board of Doctors is made, a bill for the fee and traveling expenses if there are any, of the third appointee shall be made in duplicate, one copy to be sent to the Carrier and one copy to the General Chairman. The Carrier and the Brotherhood of Railroad Signalmen Local 56 shall each pay one-half of the fee and traveling expenses of the third appointee.

(b) When as a result of examination by a Board of Doctors established under the provisions of this Rule, an employe is restored to service, such report of the Board of Doctors shall not constitute a basis for compensation claims for the period during which such employe was held out of service. In such case, however, the employe shall be returned to service with reasonable promptness after the report of the Board of Doctors is received."

We have studied the voluminous record in this case with care and conclude that the Claim must be denied. Less than nine (9) months after the trial, the Organization, in support of its position, offered notes from the same physicians who testified at the trial as to Claimant's permanent disability, that Claimant had recovered sufficiently to perform light duty. In our considered judgment, the doctrine of estoppel plainly bars this Claim. See Award 21 of PLB 1660; First Division Award 6479; Second Division Award 9921; Third Division Awards 6215 and 23830. See also Scavano v. Central Railroad of New Jersey, 203 F.2d 510 (Burns, 1953) and Davis v. Wakelee, 156 US 680, 689 (1895). Of particular significance is the decision in PLB 3001, Award No. 2, involving these same two Parties in a relatively similar dispute:

"It has long been established in many forums that having recovered a verdict for loss of future earnings due to permanent injury a Claimant cannot later take an inconsistent position seeking reemployment. He is estopped from so doing, his recovery having acted to end his employment.

> Scarano vs. Central RailRoad of New Jersey, 203 Fed.2nd 510 (1953) and the numerous awards since relying thereon. In determining whether this type of estoppel applies to the instant matter two factors must be considered: a) the nature of the claim upon which the verdict was rendered and b) the size of the verdict. * * *"

With this record it cannot be disputed that the thrust of Claimant's entire personal injury case and plea to the jury was for permanent disability. Perhaps the magic word "permanent" was not mentioned by Claimant's attorney, but we need not rely here on any single word when the Claimant's position focused with such unalloyed clarity on the end of his employment with the railroad.

Further support for this conclusion is found in the measure of damages. As a guide, Claimant's attorney, after reviewing all the elements of damages over the years to be considered stated that the jury could come up with a figure of "a million, four, or a million, or $850,000."

The Majority in Award 21 of PLB 1660 observed in a similar case that "...A jury does not award a verdict of a quarter of a million dollars to plaintiffs who are temporarily or casually injured..." Also see Public Law Board No. 1735, Award No. 1, Case No. 1, dealing with a pre-trial settlement for $160,000, wherein it was observed "...that 'The size of the pre-trial settlement was of such substantial nature as to deem that it included therein Claimant's prospective loss of earning capability, with Carrier, for many years to come.' So much more compelling is a $670,000 settlement."

Therefore, from the nature of the jury's action and the size of the verdict this Board concludes that Claimant is estopped from seeking restoration of employment with Carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1989.