

AWARD NO. 10
Case No. 22
(A) and (B)

PUBLIC LAW BOARD NO. 1493

PARTIES) NORFOLK AND WESTERN RAILWAY COMPANY
TO)
DISPUTE) UNITED TRANSPORTATION UNION (CET)

STATEMENT OF CLAIM: Case 22(A) Case of Toledo Brakeman S. E. Crock who was denied his seniority after requesting a Board of Physicians. Claim is for time lost from 60 days prior to October 13, 1975 until restored to service.

Case 22(B) Case of Toledo Brakeman S. E. Crock who was denied a Board of Physicians and held out of service. Claim is for pay for time lost and restoration to service with full seniority rights.

FINDINGS: This Public Law Board No. 1493 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was injured February 24, 1972 while in the service of the Carrier. The claimant sued the Carrier and on March 11, 1975 secured a verdict in the sum of \$100,000.00.

On March 31, 1975 the claimant requested the provisions of the Tri-Party Medical Board. A letter dated March 28, 1975 from a medical doctor was attached to the request. The letter stated that claimant was fully qualified to perform the duties of a railroad brakeman.

The Carrier contends that the claimant was estopped from claiming that he was physically able to return to work on the basis that the claimant's physician testified at the trial for damages that claimant would not be able to do this kind of work.

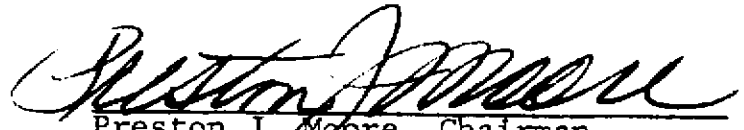
There certainly was no time for the claimant to recover from the time of the judgment until the time he requested reinstatement. The "estoppel" upon which the Carrier relies is a limited application to the general rule that "a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits."

In other words, the claimant contended herein and placed testimony on the witness stand that he was physically unfit to work for the Carrier, and as a result of that testimony, acquired a judgment in the sum of \$100,000.00 from the Carrier. Then approximately two weeks later the claimant alleged that he was physically able to work

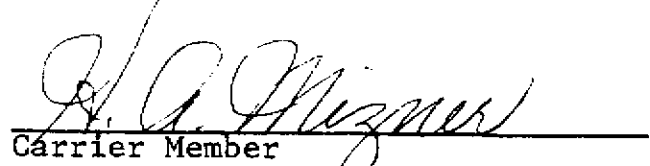
and should be entitled to return to the service of the Carrier.
In effect, the doctrine of estoppel says "You can't have it both
ways. You either are or you are not."

On the foregoing basis we find no support for the claim.

AWARD: Claim denied.


Preston J. Moore, Chairman


Organization Member


Carrier Member

Indianapolis, Indiana
December 1, 1976