PUBLIC LAW BOARD NO. 1735

Award No. 1

Case No. 1

Parties to Dispute: United Transportation Union and Longview, Portland & Northern Railway Longview Switching Company

Statement of Claim: "Claim in behalf of Glen A. McGohan for return to service as a switchman on the Longview, Portland & Northern Railway and Longview Switching Company and for back pay at switchman's rate for five days each week beginning January 17, 1975."

Findings: The Board finds, after hearing upon the whole record and all evidence, that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated January 23, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearings held.

Claimant was employed by the Longview, Portland & Northern Railway (LP&N) on December 10, 1965. He was working as Conductor on a LP&N log train at Gardner, Oregon, on September 16, 1972. While climbing a ladder of wood chip car SP390148, about 10:30 AM, claimant was caused to slip and fall from the top of the ladder of said car. His fall to the ground resulted in breaking bones in claimant's lower left leg.

As a result of such injury, claimant was unable to continue in service. He moved to Deer Lodge, Montana, to recuperate and work elsewhere. A Montana law firm contacted Carrier's insurer and advised them of claimant's intent to seek settlement for his injury claim in a Federal Employers Liability Act Case. Counsel, among other things, stated:

"The liability in this case appears to be absolute. The injury to my client is a very serious one with permanent residual as the prognosis of the doctors. These residuals will ultimately result in requiring that the ankle be fused, which will, of course, preclude my client from following his chosen occupation as a railroad employee."

Said counsel submitted a settlement offer, in April 1973, in the amount of $200,000.00 which he contended was reasonable in view of the permanent nature of claimant's injury and his age.

Claimant, subsequently apparently turned his case over to an Oregon law firm who filed suit on June 29, 1973, in the United States District Court for the District of Oregon. Section III of their Bill of Complaint averred that:

"Plaintiff suffered severe mental and physical injuries including injury to his left leg which have rendered him permanently disabled, all to his damage in the sum of $500,000.00."

A pre-trial settlement was reached on July 18, 1974, and claimant signed a "release" for a full, final and complete settlement and received the sum of $160,000.00 therefore.

Some five months later claimant, on January 17, 1975, attempted to mark up as a trainman. He was not permitted to do so. He was informed that a full and final settelement had been made in his case, that his name was removed from the seniority roster, and that he is no longer considered physically fit for train service. Claimant submitted a time slip under dates of January 17, 1975, claiming therein:

"I reported to work and was refused service from January 17 till January 20, 1975. I reported to work again January 28, and was again refused service. These time slips will continue until reinstated. I am available for work and can be contacted at 422-8563, or through my attorney, Mr. Zig I. Zakovics (503) 226-1151, Portland, or through Max Wilson, our Union Representative."

Claimant also wrote Carrier, January 19, 1975, protesting the removal of his name from the seniority roster.

The Claimant's General Chairman wrote Carrier on March 8, 1975, on behalf of Claimant, advising therein that Claimant had obtained a medical release from Carrier's medical examiner on February 11, 1975, had presented it on February 13, 1975, and attempted to mark up for service and was refused. He alleged that Carrier had dismissed claimant without an investigation. He requested that Claimant be returned to service with back pay to January 17, 1975. Subsequently, the parties held conferences on this matter. Carrier agreed at a January 23, 1976, conference to restore Claimant's name to the seniority roster with the notation thereon: "Indefinite Leave of Absence." Additionally, arrangements were made at that meeting to provide Carrier with an up to date report of Claimant's physical status.

Claimant was sent to the Doctor who examined him in 1973 and, among other things, then stated, "It is probable that he cannot carry out the work of a brakeman or a conductor, either before or after the ankle is fused. . . . He should be retrained into some lighter occupation." However, said Doctor now reported, under date of February 24, 1976, in part, that "I believe that this man could return to his job as brakeman and conductor on your railroad without further treatment of his ankle. His condition is stationary and not disabling." However, Carrier asked the opinion of the Chief Medical Officer of the Burlington Northern, one of the proprietary lines of the Longview Switching Company which is delegated to handle labor relation matters that may arise. Said Chief Medical Officer advised, "Although this man apparently has done very well, it is my medical opinion that he should not undertake any activity requiring considerable exertion, jumping, or getting on or off moving equipment. Therefore, he is not medically acceptable for the position of trainman."

The Employees' position, simply stated, is that claimant secured a medical release from Carrier's local doctor, and having passed his physical examination, as well as that of the Medical Consultant, Dr. Cherry, Carrier failed to return him to service. Hence, Claimant is thus being held out of service without an investigation, which results in a violation of Article VI, Rule 1. The Employees allege that Carrier's sole reason for holding Claimant out of service is because of his law suit. NRAB First Division Award #20023 was offered in support of their position.

Carrier argues that Claimant alleged permanent disability, that his medical data, his counsel's arguments and Court Pleadings espoused such disability and that such disability was the factual basis relied upon by Carrier in reaching the pre-trial settlement in the sum of $160,000. Carrier avers that Claimant is precluded from attempting or making a medical showing of physicial qualification as such is inconsistent with his prior position which resulted in the pre-trial settlement. Carrier gave numerous law citations and Board Awards in support of its position on the legal theory of estoppel.

Here, Carrier pleaded the equitable defense of the doctrine of estoppel to bar Claimant's return to service. Whether such type be "estoppel in

pais", "collateral estoppel" or, as stated by Carrier, the "doctrine of preclusion against inconsistent positions" does not here require a definitive finding. The general rule of estoppel was expressed by the Court of Appeals in Scarano vs. Central RR. of New Jersey, 203 F 2d 510 as: "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 evil the courts should not tolerate." (203 F 2d p. 513.)

The Board finds that Carrier, did not, as the result of any of the actions taken by Claimant, from January 17, 1975, on, ever waive its position or its right to assert estoppel. The restoration of Claimant's name to the seniority roster eliminated such from being a source of subsequent argument.

NRAB First Division Award No. 20023, cited by Employees, involved Claimant Ezra A. Jones, who, as here, was injured in an on-duty accident. He filed a law suit under the Federal Employers Liability Act to recover for his injuries. Ezra Jones alleged, and the defendant railroad, unlike Carrier here, denied that petitioner Jones was permanently disabled. The jury found in favor of Petitioner Jones. Monetary satisfaction was reached on that judgment and Carrier thereafter removed claimant's name from the seniority roster. He grieved for being unjustly removed from service and sought pay for all time lost. His claim ultimately resulted in being sustained by Award No. 20023. Carrier, however, refused enforcement thereof. Proceedings for enforcement of the Award and Order was instituted in the U. S. District Court, N.D. of Georgia. That Court set said Award aside and said, in part:

"It seems to this Court the applicable rule of law is firmly established that one who recovers a verdict based on future earnings, the claim to which arises because of permanent injuries, estops himself thereafter from claiming the right to future re-employment, claiming that he is now physically able to return to work. Scarano vs. Central RR of New Jersey, 3 Cir. 2135 2d 510,.....once he had declared in the State Court that he was permanently disabled and unable to, in the future, perform work as a switchman and offered proof in substantiation of his disability, he was no longer in position to claim with respect to any alleged future rights or privileges, further employment under his prior employment contract....."

The facts of this case persuade the Board that Claimant and his representative, presented sufficient credible evidence, ably designed to persuade

and convince the Carrier, as well as the Court, that Claimant was permanently incapacitated from performing his usual duties as a Conductor - Trainman. It was convincing. Carrier did not present any countervailing evidence. Carrier, in fact, acted in reliance on such representations of Claimant's physical condition and, in good faith, entered into the pre-trial settlement of Claimant's damages for $160,000. 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 because of his physical impairment.

Consequently, we find that the facts herein are comparable to those found in Jones vs. Central Georgia Railway Company, 220 F Supp. 909 (1963). Accordingly, we conclude that claimant is estopped from now urging in this forum that his physical condition is inconsistent with that upon which his pre-trial settlement was based. We cannot find that in the circumstances, that carrier's actions were arbitrary or capricious and the claims are denied.

Award: Claims denied.

F. D. Tuffley (dissent)
F. D. Tuffley, Employee Member

T. C. DeButts
T. C. DeButts, Carrier Member

Arthur T. Van Wart
Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Atlanta, Georgia, October 4, 1976.