Award No. 6129
Docket No. 5926
2-C&O-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William H. McPherson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

CHESAPEAKE & OHIO RAILWAY COMPANY (Chesapeake District)

DISPUTE: CLAIM OF EMPLOYES:

1. That carman R. V. Crum, who was regularly assigned at Russell Terminal Repair Track, first shift, work week Monday through Friday, rest days Saturday and Sunday has been discriminated against by being unjustly held out of service in violation of rules 23 and 38 of the shop crafts' agreement.

2. Accordingly Crum is entitled to be compensated eight (8) hours at carmen's applicable straight time rate of pay for July 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, August 1, 2, 5 and 6, 1968 and each following five (5) day week while being unjustly held from service.

EMPLOYES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, owns and operates a large facility at Russell, Kentucky, consisting of diesel house, shop track and transportation yards where cars are switched, repaired, classified and cars are interchanged from other roads to the C&O lines.

Carman R. V. Crum, hereinafter referred to as the claimant, held regular assignment on the shop track, first shift, hours 7:00 A. M. to 3:30 P. M., work week Monday through Friday, rest days Saturday and Sunday. Claimant sustained a back injury when a Chesapeake and Ohio Railway truck struck his car on a U. S. Highway while not on duty. Claimant filed a suit account of said accident and verdict was rendered by a State Court Jury. Claimant was off work account said accident commencing July 27, 1966; however, claimant's physical condition showed steady improvement until finally claimant felt that he had reached the point physically where he could return to work and perform adequate service. With reasonable cooperation from the carrier, claimant's seniority was such that he could bid on a job doing light work. Claimant's

2. Rules 23 and 38, the only rules on which the position of the employes have been based during the handling on the property have no application under the circumstances present in the Crum case.

3. Crum is not physically qualified for service.

4. Carrier would take upon itself undue liability if it were to permit Crum to resume service as Crum with his history of injuries may well be expected to sustain additional injuries for which carrier would be blamed and risk liability both to Crum and other employes who might sustain injury due to his condition.

In view of the above, the carrier asks that the case be dismissed on the basis that Crum may not now come before the Board and make pleadings in direct conflict with his pleadings before the court which were swayed by such pleadings to the extent that Crum was awarded a sizable verdict; and without prejudice to this position that the claim of Employes be denied on basis of merits.

FINDINGS: The Second 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 waived right of appearance at hearing thereon.

Claimant was first employed by Carrier in May of 1947 and holds Carmen seniority as of April, 1956, at Carrier's facility at Russell, Kentucky. While off duty on July 27, 1966, he was involved in a collision with one of Carrier's trucks, aggravating an apparently congenital back defect to the point that he was unable to continue work. He brought suit for damages against Carrier, claiming that, although he would eventually be able to perform light work, of some kind, he would never be able to resume work for Carrier. He asked for $150,000 damages on the basis of normal possible annual earnings of about $6,000 at age 38. In November, 1967, he obtained a jury award of $54,575, which was paid. On July 5, 1968, he reported for work and was referred for examination to Carrier's local medical examiners. Their reports were presumably forwarded to Carrier's Chief Medical Examiner, and Claimant was notified on August 20 that he had been found to be physically disqualified for resumption of service at that time.

The Organization contends that Carrier has violated Rule 23 of the Agreement (providing that employes who have given long and faithful service and have become unable to handle heavy work will be given preference for light work in their line) and Rule 38 (providing that an employe will not be suspended or dismissed without being given an investigation). It further contends that several doctors, including some in Carrier's employ, have certified

that Claimant is able to resume carmen's work. Although it admits that Claimant is permanently disabled for the heavy work of a car repairman and that "his condition is the same now as it was at the time of the trial" (which appears probable in view of the medical testimony at the trial and the fact that he has not had a further operation since that time), it contends that he is able to perform the allegedly "light" work of a car inspector. It points out that Claimant did not plead that he was permanently and totally disabled, and contends that the Carrier's medical witnesses all testified that Claimant would be able to resume work. Finally, it contends that our Award No. 3837 should be controlling in this case, and that Carrier has acted in an arbitrary and vindictive manner in withholding Claimant from service.

Carrier contends that Rule 23 was not violated because Claimant is physically disqualified for any carman's work, and that Rule 38 is inapplicable because Claimant has not been suspended or dismissed, but remains on the seniority roster. It alleges that to return Claimant to service would endanger him and his fellow-employes, since he has had an exceptional number of on-the-job accidents, several of which required hospitalization, three of which involved back injury, and for three of which he obtained financial settlements. Carrier further contends that the doctors' reports, on which Claimant chiefly relies, were in one instance fraudulent and in the other based on superficial examination. It urges that our Award No. 3837 is not applicable to the present circumstances, and that in any case Claimant is now estopped from claiming that he is qualified to resume service with the Carrier because of his successful contention in his damage suit that he would never be able to resume his prior employment.

We must first consider the basic claim of estoppel. In Award No. 3837 we denied equitable estoppel, but in that case a financial settlement was reached by negotiation, in the course of which the carrier sought to obtain a resignation but abandoned that position, thus recognizing that resumption of service might well be requested.

In our judgment, what is involved here is not equitable estoppel, but collateral estoppel, as found by the United States Court of Appeals for the Fifth Circuit in Jones v. Central of Georgia Railway Co. (331 F. 2d 649) and as discussed by the United States Court of Appeals for the Third Circuit in Scarano v. Central Railroad of New Jersey (203 F. 2d 510).

Concerning the pleadings of Claimant in his damage suit, the Organization points out that the written Complaint claimed only a "diminished capacity to work" and "permanent disability," not total disability. It contends that we cannot properly look to the claims made by Claimant's attorney in his opening and closing statements to the jury because they were not evidence. At this point we are concerned not with the evidence but with the claims presented to the jury, and it makes no difference whether they were presented in writing or orally. It is clear that Claimant contended that he would never again be able to work for Carrier. We shall give only one quotation from the opening statement and two from the closing statement, without giving the full context that appears in the record:

> ". . . the evidence will be from a medical standpoint that this man is no longer employable as a carman in the shops in the Chesapeake and Ohio Railroad, that he can no longer go back and do this

work, that he will never again for the rest of his life be able to do physical, hard labor. He is therefore precluded from any of the seniority rights in his work at the Chesapeake and Ohio car shops, since they do not have any light work. They have only heavy work at the car shops."

". . . now he is no longer fit or able to ever do heavy work again. In other words, he can't go back out there and earn a living at the C&O yards."

". . . I don't stand up before you and tell you that when this lawsuit is over with, that Roy Crum isn't going to find something to do. He's going to have to find something to do. I don't know where he's going to find it, I don't know what he's going to do. You see, I would have been very interested to have heard from the defendant in this case some solution that they have. I didn't hear the defendant present any jobs that Roy would be physically able to do after this lawsuit is over with. I didn't hear any comments by any witness on their part as to where Roy was going to go and where he was going to earn a living. Let me say this to you, ladies and gentlemen. Perhaps he could earn $200.00 a month for the next 25 years. That's $60,000.00. . . ."

There remains only the question as to whether Claimant was successful in his pleadings. The size of the jury's award, in conjunction with the suggestion made to it that Claimant might well earn at least $60,000 elsewhere, justifies our conclusion that the jury was persuaded that he could never return to his former employment, even though the award was not much more than a third of the amount requested. Having successfully pressed certain claims in his court case, Claimant cannot now seek a return to service on the basis of contradictory claims.

The Parties have cited a number of Board awards and court cases. A review of numerous awards is presented in Award No. 2 of Public Law Board No. 269, with Howard A. Johnson as Chairman. It will not be repeated here. We believe it shows that our decision in this case is consistent with the vast majority of the pertinent awards. We think it is also consistent with a long line of court cases mentioned there and with the opinion in the most recent major case on this subject by the United States Court of Appeals for the Fifth Circuit in Hodges v. Atlantic Coast Line Railroad Co. (363 F. 2d 649).

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1971.

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