Award No. 2500
Docket No. 2216
2-ACL-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carl R. Schedler when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO. (Carmen)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (1) That under the controlling agreement, Car Repairer Helper P. Q. Todd has been denied his contractual service rights since March 29, 1955.

(2) That he be restored to service with seniority rights unimpaired and compensated for all time lost at the applicable rate retroactive to the aforementioned date.

EMPLOYES' STATEMENT OF FACTS: According to the published seniority rosters, P. Q. Todd was first employed in the mechanical department at Waycross, Georgia as a blacksmith helper with a seniority date of 9/13/45. He is so shown on each succeeding annually published roster through 1950.

In December 1950, he applied for and was given employment in the carmen's craft as car repairer helper and established a seniority date of 12/13/50. Todd's name is omitted on the blacksmith helper classification on the 1951 roster and appears on the carmen's roster under the classification of car repairer helper and so appears on succeeding rosters including the January 1, 1955 roster. The 1953 roster indicates he was upgraded to carman 10/9/52 under the provisions of Rule 406. His name is entirely omitted on the current 1956 roster.

On the morning of October 13, 1953, while working as upgraded carman, Mr. Todd received a personal injury to his back while on duty. He reported to the ACL Hospital and was examined by Dr. Bradley, received first aid and was permitted to continue in service on light duty. Between October 13 and October 30, Todd worked intermittently and was confined to the hospital for as much as a week—October 18-24—during which time he was treated by the nurses in the hospital except for one visit by an outside physician (Dr. Victor) on Friday afternoon, October 20, when Todd was examined and treatment prescribed. After being discharged October 24, Todd again attempted to return to work on light duty but, because of the continued aggravation of the injury, he checked out on October 30. Since

Becker v. Philadelphia, 217 Pa. 344, 66 A. 564; Hess v. Vinton Colliery Co., 255 Pa. 78, 99 A. 218, 14 A.L.R. 1.

To permit plaintiff to recover in this action on his claim would, in effect, permit a double recovery for the identical loss of earning capacity. I concur in Judge Goodman's reaction to the exact situation in the Buberl case, supra. I find no factual issue present in this case which would prohibit a summary judgment. Scarano's physical condition at the time he sought reinstatement is immaterial since the defendant had already paid him for permanent or protracted future loss of earning capacity. Certainly, the defendant in refusing reinstatement should be entitled, particularly within such a short period after the trial, to rely upon the testimony presented by the plaintiff that he was totally and permanently disabled from performing any railroad work."

The decision of the District Court was affirmed on appeal in **Scarano v. Central R. Co., of New Jersey,** 203 F. 2d 510 (C.A. 3rd 1953). Speaking for the court, Judge Hastie concluded:

"* * * 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 asked 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 found 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."

To the same effect, see **Buberle** v. **Southern Pacific,** 94 F. Supp. 11 (D.C. Calif. 1950); **Pendleton v. Southern Pacific,** 21 L.C. 66,883 and **Wallace** v. **Southern Pacific,** 21 L.C. 66,882. These decisions were all based on the principle of equitable estoppel and have not been overruled or modified by subsequent court decisions.

The law is well established by awards of the National Railroad Adjustment Board and by court decisions that when an employe claims permanent and total disability and recovers judgment on that theory, carrier is under no obligation to return him to service. In this claim Mr. Todd brought suit against carrier and presented testimony and other evidence to show that he was permanently disabled and unable to perform his regularly assigned duties. As a result of the suit Mr. Todd was awarded a jury verdict of $10,000 which has been satisfied by the carrier. Notwithstanding his allegations at the trial, Mr. Todd applied for return to the service of carrier within 60 days after he was awarded judgment. In the words of the Federal Court in the Scarano suit, it would be "highly inequitable, unconscionable and a travesty on justice to permit a plaintiff . . . after he and his medical expert have presented a case of total and permanent disability to a jury and thereon recovered a very substantial verdict to disavow those sworn statements and contentions." Carrier asserts that this claim is utterly without merit and hould be denied by the Board.

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.

The parties to the dispute were given due notice of hearing thereon.

Rule 21, provides:

> "No employe shall be disciplined without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing such employe and the local chairman will be apprised in writing of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of necessary witnesses and be represented by the duly authorized representative of System Federation No. 42.
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> When cases are being investigated the evidence will be written up with the sufficient copies to give those concerned.
>
> If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for the wage lost, if any, resulting from said suspension or dismissal."

The claimant began his employment with the carrier on September 13, 1945, and was continuously employed until October 30, 1953, which is about the time this claim arose. On the morning of October 13, 1953 he received an injury to his back while at work for the carrier. He reported to the medical department and was treated and placed on light duty. From October 13 to 30 he worked intermittently except for spending the week of October 18 in the hospital. He returned to work about October 25 and left work on October 30, complaining of continual pain in his back. He was examined and treated by several doctors. He attempted to settle his injury claim with the carrier, and failing to do so, filed suit against the carrier for $100,000.00 damages. The trial was had and on December 6, 1954 the jury awarded damages to the claimant in the amount of $10,000.00, which was satisfied by the carrier. On or about March 29, 1955 the claimant reported for work and the carried declined to restore him to service.

The carrier contends that it does not have to restore him to service because he took himself out of service when he recovered damages from the lawsuit. The carrier assumes this position on the basis that the claimant sued for permanent disability, and having recovered he is no longer entitled to any rights he may have under the labor agreement.

We are unable to find anywhere in the court pleadings wherein the claimant asserted that he was permanently disabled. On the contrary, the pleadings state, "Such injuries may be permanent in character." This does not constitute a positive statement of permanent disability, and neither is it an allegation of permanent disability. It is, at most, conjecture as to what may happen in the future. The claimant's personal physician testified that he would never be able to do any work requiring strenuous lifting or bending. The physician did not testify that he was permanently disabled.

The carrier also attempts to prove that the claimant alleged permanent disability by submitting in its brief the oral argument made to the jury by claimant's attorney at the trial on the damage suit. Statements to the jury by claimant's attorney are in the nature of argument; they are not evidence or proof.

The carrier has the right under the agreement to discharge employes for cause. We do not believe it is proper cause to dismiss an employe who asserts

his legal rights to bring an action against his employer, based on a right which arose out of the employment relationship. We find nothing in the agreement denying an employe the right to pursue a remedy in the courts for an alleged injury sustained during the course of his employment. We believe any such arrangement, by agreement or otherwise, would tend to abridge a civil right belonging to all citizens. The right to appeal to the courts for the redress of wrongs is a fixed part of our way of life. We cannot sustain any action which would penalize the claimant for exercising that right.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of June, 1957.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 2500

In this case the majority have done, administratively, what the courts in both state and federal jurisdictions have soundly refused to do. Court decisions, in this same case posture, have held that a railroad worker who has by proper sworn testimony through competent medical prognosis disclaimed his physical ability to resume work in his regular occupation is thereafter flatly estopped from disclaiming his disclaimer. But the majority say he can. This award is wrong in its opposition to law.

This is not a discipline case. The claim itself does not allege discipline of claimant. The majority, in their findings of fact, prior to this erroneous administrative conclusion, do not find the claimant was disciplined. They say, correctly in this respect, that the carrier "declined to restore him to service." This was the "service" he told the court and the jury he would never be able to do. He was answering $50,000 questions when he offered that story; two of them, for he sued for $100,000, laying his **ad damnum** in two counts of $50,000 each.

From examination of the record, the plaintiff stated in his complaint (offered in evidence by both the employes and the carrier) that he sued the carrier, and **"alleges"**—in each of two counts—after a recital of the nature of his injury and damages, that "Such injuries may be permanent in character." He demanded judgment in the amount of $50,000 on each count. His allegations were no more or less than a statement of the facts as he believed them to be, and which he hoped to prove. His allegation that his "injuries may be permanent in character" was no less a statement of fact and hoped for proof than any other statement in his allegations.

Plaintiff then sought to establish his allegations by evidence. At the trial he testified that his back hurt, that if he walked much it hurt, that if he rode much it hurt, that he couldn't lift, that he had difficulty bending over, and that he had not done **any** work. He then offered the testimony of his doctor as a medical expert to establish the facts he had alleged he could prove.

His doctor testified unequivocally, in response to question by plaintiff's attorney, "Can you tell us, Doctor, what effect the injury to his back is going to have **on his ability to return to work?**" that—

> "I do not believe he is going to be able to do the type of work in which he was working when he was hurt."

and to question, "do you think that he would be able to return to doing **any** work requiring strenuous lifting or bending, he said—

> **"No, sir."**

He testified further that "right now he has pain all the time. He eventually will not have it constant. It will become intermittent," and in reply to question, "How long a period of time do you think it would be intermittent pain? Just for another year?", the Doctor testified—

> "No, that would be on a long time, possibly the remainder of his days, **probably** the remainder of his days."

In summing up the case before the jury, plaintiff's attorney drew attention to his Doctor's testimony in these words:

> "He said Mr. Todd is **never** going to be able to go back to do the kind of work he was doing. He will **never** be able to do any work that is going to require strenuous lifting or bending.
>
> Gentlemen, **he is washed up so far as working on a railroad is concerned. . . .**"

On his evidence the plaintiff prevailed, and was awarded judgment. He is bound not only by his own statements, but as much by the statements of his witness and his counsel as if he had himself made them. His permanent disability is an established legal fact—that he would **never** be able to return to his former job on the railroad.

The issue presented to this Division in the claim which results in the award is solely that of estoppel.

The employes argued in their rebuttal that there is a vast difference between an injury resulting in total and permanent disability, and one which results in an injury permanent in character, and that the plaintiff's allegation was of the latter; and further, that the verdict of the jury in the amount of $10,000 very clearly indicated that the jury only allowed plaintiff compensation for pain and suffering and lost wages from time of injury until time of trial; that the verdict simply is not indicative of any award by the jury of any future lost wages.

No one can ever state with exactitude precisely what the verdict of a jury is "intended" to compensate plaintiff for, and this is not a matter for speculation by this Board. The very court in which the verdict was returned would not permit any attempt to do so when the jury returned it. And even if the employes' contention as to the allegation of permanent disability were conceded, as was ably stated by Referee David R. Douglass in First Division Award No. 17191, in a somewhat similar circumstance,—

> "The complaint, filed in the claimant's court action, did not specify whether the injuries were permanent or temporary, but stated, in effect, that such would be made known when determined. The record before us shows that it became the position of the claimant through the testimony of his own doctor that as a result of the injuries the claimant would permanently be unable to perform work in engine service."

Claimant in the instant case was a carman helper. That is the kind of work his doctor testified he would not be able to return to. Carman helper's work **requires** strenuous lifting and bending. That is the only kind of work to which the carrier could return him, because other work which would not require such physical effort, such as clerical work for example, belongs to other employes by their contract with the carrier, but this did not prevent the jury from considering plaintiff's ability to work at many other occupations.

In asserting any right to return to carrier's service as a carman, plaintiff contradicted the earlier position he had taken in court. Thus the award is completely incompatible with the doctrine of estoppel laid down in the same

kind of case involving a railroad employe by a United States Court of Appeals in **Scarano vs. Central Railroad Company of New Jersey**, 107 F. Supp. 622, aff'd, 203 F. 2nd 510, which is found in II Freeman on Judgments 631 (5th ed. 1925), as follows:

> "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."

With the rule of estoppel so firmly established in this railroad field by the **Scarano** case, above cited, the employes have correctly conceded, in their rebuttal, that "In both of these cases (Second Division Awards Nos. 1186 and 1297 the claimant claimed and sued on a basis of total and permanent disability," the doctrine applies, and on the face of the evidence hereinbefore pointed out, it is no less applicable in the award here dissented to.

For a fuller discussion of the **Scarano** case, see Second Division Award No. 1805 (Referee Edward F. Carter), Carrier's Position, and findings.

The award is erroneously predicated upon an after showing of physical ability. This Division can not properly concern itself with an after attempt by the now claimant to show an amazing and complete restoration of the physical powers to stoop and bend and lift at the work of his class, only two months after judgment was satisfied, the very powers that were represented at the trial as having been taken from him in his then role of plaintiff, that he would **never** again be able to exercise. He is certainly estopped from making any such showing by all of the principles of law denouncing inconsistent conduct by one party in dealing with another. The holding of the majority otherwise in this award is not only in error, but it is contempt of every rule of law and the almost universal statutes aimed at eliminating as far as possible false swearing.

For an able discussion of the principles involved, as well as citation of court cases and Board decisions supporting the minority view herein stated, and discussion of the illusory theories of the employes in seeking to evade the doctrine, see Dissent of Carrier Members in First Division Award No. 17645, in which the majority of that Division erred in the same manner and to the same degree as in the instant claim, and Supporting Opinion in First Division Award No. 17191.

That generalizations such as are indulged in in the closing paragraph of the findings are, to say the least, undesirable, is generally conceded, but generalizations without any foundation in the contentions of either party as in this case are so inimical to the interests of the National Railroad Adjustment Board in the orderly disposition of disputes as to require no discussion.

The award is of no probative or precedent value, not only because it is at odds with basic text law on the subject of Estoppel and federal and state case law, but because it is contrary to legally sound awards of this and other Divisions of the Board, which present by far the better view. See especially **Second Division** 1186, 1297, 1579, 1672, 1805; **First Division** 6479, 6483, 15543, 16819, 17191; **Third Division** 6215, 6740.

The award stands in error of reversible character for the foregoing reasons, and in short:

> (1) It disregards probative pertinent facts established by the carrier by evidence from the record of the trial court and is not responsive to the contentions of the carrier based on that evidence;
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> (2) It ignores the principle of estoppel upon which many previous decisions by this and other Divisions of this Board have been based;

(3) It generalizes and puts in false issue the civil right of the claimant employe to bring legal action against his employer on the mere assertion by the employes that claimant violated no law, rule or valid regulations prohibiting such action, notwithstanding that the employes in their ex parte submission or rebuttal did not even charge that carrier so dismissed him, nor was there any contention by the carrier that it can deny employment to claimant or any other employe merely because such employe files suit against the carrier.

E. H. Fitcher
M. E. Somerlott
D. H. Hicks
R. P. Johnson
J. A. Anderson