Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7976
SECOND DIVISION Docket No. 7678
2-N&W-CM-'79

The Second Division consisted of the regular members and in addition Referee Arthur T. Van Wart when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I O. (Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That under the current Agreement Leroy Juenger, Carman was unjustly and improperly removed from service of the Norfolk and Western Railway Company January 30, 1976.

2. That accordingly the Norfolk and Western Railway Company be ordered to reinstate Carman Leroy Juenger with his seniority rights unimpaired.

3. That the Norfolk and Western Railway Company be ordered to reimburse Carman Leroy Juenger for all time lost beginning January 30, 1976 and continuing until he is returned to service.

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, who was first employed in 1953, worked at Carrier's car shops in St. Louis, Missouri. He suffered an on-duty back injury on May 30, 1974. Claimant returned to full time duty February 8, 1975 as a Carman in Carrier's Luther Yards, St. Louis and worked up until and including January 25, 1976.

Claimant undertook a FELA action and entered suit for his on-duty injury and demanded a judgment of $250,000.00. Item 6 of Claimant's Complaint stated:

> "6. That as a direct and proximate result of the aforementioned negligence of the Defendant, the Plaintiff sustained diverse and numerous permanent injuries about his face, head and body, all of which have caused and will cause him to sustain great pain and mental anguish; that Plaintiff has also been obliged to spend large sums of money in hospitals and medical expense in endeavoring to cure his said injuries; and that Plaintiff has lost and will lose large sums of money in earnings and income he would otherwise have earned, had it not been for his injuries."

The suit came to trial January 26, 1976 and concluded January 29, 1976. Claimant's doctors testified during the trial that his injuries were permanent in nature and that he could not and should not perform the ardous duties of a carman. Claimant's Attorney requested that the jury compensate Claimant for the ten (10) remaining years before he reached the retirement age of sixty-five (65). The jury, at the conclusion of his trial, awarded Claimant a judgment of $85,000.

Claimant reported for duty January 30, 1976 at which time he was advised that based upon his pleadings, and the judgment rendered as a result of Claimant's plea, he was estopped from contending that he could perform the duties of a Carman and that he would not be permitted to return to work with the Company, as a result thereof the instant claim was filed.

This is not a disciplinary matter. Claimant's name is still carried on the Carmen's roster at St. Louis with a notation beside it that he is in a sick status.

Carrier's affirmative defense raises a case of estoppel. The Court of Appeals in Scarano v. Central RR of New Jersey, 203 F 2d 510 expressed the rule 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 end the courts should not tolerate."

"Scarano" was followed in Jones v. Central of Georgia Ry. Co. (USCD ND. Ga) 48 LC par. 1856, which case involved Carrier's refusal to apply First Division Award 20 023 which had sustained therein a claim of an employee who, as here, had suffered an on-duty injury. Jones filed suit under the Federal Employers' Liability Act to recover the alleged therein that he was permanently disabled. The jury found in Jones' favor. After the monetary

satisfaction had been reached, Carrier removed his name from the seniority roster. Jones grieved and sought restoration of his seniority and pay for time lost as a result thereof. His claim was ultimately sustained by the NRAB's First Division Award 20 023. Carrier refused to comply therewith causing the suit for enforcement of the Award and Order. The Northern District Court of Georgia held:

> "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."

Similarly, the Courts in Wallace v. Southern Pac. Co., 106 F Supp. 742 (21 LC Par. 67,213), Burbank v. Southern Pac. Co., 94 F Supp. 11 (18 LC Par. 65,925); Sands v. Union Pacific Railroad, 148 F Supp. 422, 31 LC Par. 7043, among other cases, followed this legal rationale.

This Division in Award 1672 (Carter) held:

> "It is not a violation of the agreement to bring suit against the carrier to recover damages against the carrier. But when the employee alleges permanent disability resulting from the injury and pursues that claim to a final conclusion and obtains a judgment on that issue, he has legally established his permanent disability and the carrier is under no obligation to return him to service.

The Third Division in Award 6215 (Wenke) expressed the rule as:

> "The basic philosophy underlying these holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy."

The Awards of the Adjustment Board, as has those of Public Law Boards, paralleled the decisions of the courts. Such doctrine was paraphrased by PLB 1493 (Moore) on this property, in its Award No. 10, "You can't have it both ways. You either are or you are not."

This Board is impelled to follow such doctrine and the Awards of the various Divisions of the NRAB as well as PLB 1943, on the property, which denied claims similar, if not identical, to the instant case. This claim will likewise be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 20th day of June, 1979.

DISSENT OF LABOR MEMBERS TO AWARD NO. 7976, DOCKET NO. 7678

The Claimant in this dispute was working for Carrier as a Carman when he became injured on May 30, 1974. He was able to return to work on February 8, 1975 and did so, continuing through January 25, 1976, preceding the date he went to trial over his personal injury.

The trial lasted three (3) days and Claimant was awarded $85,000.00. Immediately following the judgment, Claimant was not permitted to return to work as a Carman.

In denying his claim to that right before this Board, the Majority stated in part:

> "Claimant's doctors testified during the trial that his injuries were permanent in nature and that he could not and should not perform the arduous duties of a Carman."

We find no such language in the record, and how could we? Claimant had continually performed the duties of a Carman since he returned to work February 8, 1975 up to the date of the trial. What his doctor did testify to was:

> "In fact, I recommended to him he should work as long as he can, because he is not skilled in any other field or highly educated so he can work, let's say like a lawyer or a doctor or someone that knows computers and so on and so forth."

Claimant's attorney, in his pleadings before the Court stated:

> "He is a good worker. He's continued to do his job and, ladies and gentlemen, I think that his record has been such that...that we should reasonably anticipate, his past record is such, that he will reasonably be able to continue and will do and perform his particular job."

The Majority is in gross error in its Findings. Claimant has now been taken out of the labor market as a result of that gross error and permanently deprived of the opportunity to pursue his craft work. We must dissent.

C. E. Wheeler
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