Award No. 8067
Docket No. CL-7821

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(a) That the Carrier acted arbitrarily and in violation of the agreement when it notified George C. Baier by letter dated December 3, 1954 that his name and seniority date were being removed from the Clerks' New York District Group No. 1 and Group No. 2 rosters.

(b) That the carrier acted arbitrarily and in contravention of the agreement when it did not hold a formal investigation and/or hearing within the time limits indicated in Rules 60 and 67 of the agreement and further, refused the Committee's request until February 8, 1955.

(c) That George C. Baier be paid for each work day at the rate of the General Foreman position, Grand Street, Jersey City, N. J. from May 23, 1955 and until such time as his seniority is restored and he is permitted to return to work.

EMPLOYES' STATEMENT OF FACTS: While employed as a freight checker at Pier 8, North River, New York, April 20, 1951, Mr. George C. Baier was hit by a 1,450 pound roll of newsprint paper and sustained a severe injury to his back.

On account of this injury Mr. Baier incurred medical bills and, in addition thereto, lost in wages 12 days in 1951, 30 days in 1952 and 72 days in 1953. Upon the advice of his Doctor Mr. Baier requested and was granted a sick leave of absence effective December 31, 1953 and has not performed any service for the carrier since that date.

The carrier declined to make any settlement which would compensate Mr. Baier for medical expense incurred and lost wages as the result of said injury. He consequently filed appropriate suit against the carrier to recover appropriate damages for the injury. In Superior Court, State of New Jersey, Jersey City, Hudson County, on October 21, 1954, a jury rendered a verdict awarding $40,000.00 in favor of the plaintiff, George C. Baier.

OPINION OF BOARD: In the Spring of 1951 the Claimant suffered injury to his back in the course of his employment. For the following two and a half years he was, because of this injury compelled to be absent from work a great deal of the time, and finally requested and obtained a leave of absence effective December 31, 1953. Having been unable to reach a settlement with the Carrier of his claim for compensation, he had filed suit in a New Jersey court on December 16, 1952. Trial was held in October, 1954, and he recovered a judgment of $40,000.00, which has been paid.

While Claimant was still on leave of absence, Superintendent Zeigler wrote him, on December 3, 1954, as follows:

"Dear Mr. Baier:

"I have been advised that in your recent suit against the Company you alleged and proved permanent total disability and that you would never again be able to work at your job with the railroad. Your doctors also testified that you were permanently disabled and would never again be fit to return to duty. The jury returned a substantial verdict which compensated you for your future loss of earning power.

"Therefore, in view of the established permanency of your total disability, you are hereby advised that your name and seniority are being removed from the Clerk's roster as of this date."

The Brotherhood promptly protested, and after considerable delay the Carrier held a hearing as provided for in Rule 60, though it took the position that Rule 60 did not require a hearing in this type of case. Paragraph (b) of the claim alleges that the failure to hold this hearing within ten days of December 3 was a violation of Rules 60 and 67. Inasmuch as the hearing was eventually held, and the delay caused no loss to the Claimant (for he was still sick and not requesting work), this item of the claim will be denied without passing upon the merits of the question whether those rules were violated. On the facts, and in the view that we take of the other issues, it is unnecessary to pass on that question.

Following the hearing the Carrier sustained the action of Superintendent Zeigler. On May 4, 1955, Claimant's personal physician certified him as "capable of returning to his previous regular position as a clerk." On May 16, 1955, Claimant forwarded this certificate to the Carrier with a letter stating that he desired to displace the General Foreman at Grand Street, Jersey City, effective May 23, 1955. The Carrier, by letter dated May 19, declined to honor this notice of displacement on the sole ground that Claimant's name was no longer on the seniority roster. No contention was made at that time, and none has been made during the progress of this case, that Claimant, if he still held seniority rights, did not have the right to the job requested, or the ability or physical fitness to fill it. The Carrier's defense throughout has been simply that the verdict of the jury (1) estopped the Claimant from asserting his physical fitness, and (2) removed him from employment.

We turn now to the facts upon which the estoppel is alleged to rest. The Claimant had alleged in his complaint in court that he "was seriously injured, bruised and contused . . . and he was permanently injured . . ." The complaint did not allege "permanent total disability", as stated in the letter of December 3 as the reason for removing him from the roster. It did not allege, and Claimant did not testify, that he "would never again be able to work" as stated in the same letter.

The estoppel doctrine laid down in the so-called Scarano Case (**Scarano v. Central R. Co. of New Jersey,** 107 F. Sup. 622) was based upon a case of total and permanent disability. The reasons for such doctrine do not apply where the disability is total but not permanent (as where a man breaks a leg), nor where it is permanent but not total (as where he loses a finger).

It is true that some of the medical opinion introduced at the trial was to the effect that Claimant's disablement was both total and permanent, but this was mere expression of opinion and was contradicted by other medical opinion. That the jury was unconvinced that the disablement was total and permanent is clearly indicated by the size of the verdict, $40,000.00. Claimant, at the time, was 36 years old, and therefore could look forward to about 30 years of gainful employment. At an average salary of $5,000.00, surely not an unreasonably high expectation, in 30 years he would have earned $150,000.00. A verdict of $40,000.00 could well have been based on the expenses, pain, and loss of earnings from the time of the injury in 1951 to the date of the verdict in 1954, roughly three and a half years, plus some allowance for diminished earnings due to partial disability in the future. It certainly does not establish that the jury found total and permanent disability.

It is unnecessary to decide whether the doctrine of the Scarano case is sound or not, for that doctrine in any event is inapplicable to the facts here presented. That the doctrine is questionable even on applicable facts is indicated in the following excerpt from Award 17454 of the First Division, decided March 29, 1956:

> "To be the basis of estoppel conduct must be inequitable. Where an employe has been injured it is often impossible to determine definitely the extent and length of his future disability. Whether determined by the court or jury or by compromise as here it is a matter of estimate and conjecture and almost inevitably it is found later to have been unfair to one of the parties. The employe may find himself disabled long beyond the time for which he was paid or the employer may find that he has paid for disability long after recovery. In the former case the employer is not estopped to deny that his employe is still disabled and in the latter case the employe should not be estopped from asserting his ability to work. Moreover, what claimant sought was not double payment for damages resulting from his injuries but the right to work at his job for which carrier would pay only for value received. We can find no inequity there."

The decisions of this Board have been many and conflicting. The most recent decision is Award No. 2500, decided by the Second Division on June 12, 1957, in which a similar claim was sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim (b) is denied.

Claims (a) and (c) are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September, 1957.

DISSENT TO AWARD NO. 8067. DOCKET CL-7821

In arriving at its findings it is clear that the majority either failed to, or chose to, overlook the real issue presented for adjudication. Simply stated, that issue is as follows: Did the Carrier act **arbitrarily** and in **violation of the Agreement** when it notified the Claimant that his name was being removed from the Clerks' New York Group No. 1 and No. 2 Seniority Rosters?

This dispute, just like any other dispute appealed to this Board for disposition, must be resolved in accordance with negotiated Agreement Rules, or Laws, and the established legal principles thereunder. We are not free to discard these items for the sake of reaching findings which would not be justied had they been properly applied. The majority, in announcing their findings to this dispute, give every indication that they formulated their conclusions without giving due notice and conscious consideration to a number of pertinent principles which have been consistently adhered to and applied by this Board.

The most fundamental of these principles is the one which relates to "burden of proof." According to this principle, the burden of proving a claim rests with the Petitioner and the Claimant, **Award 64** (Samuell). This burden is not satisfied by mere assertions of violation, see **Award 5965** (Douglass), or by unsupported contentions of violation, see **Award 6359** (McMahon). This burden is only met when the petitioning party or the Claimant successfully presents a consistent theory which finds support in negotiated Agreement Rules, or Laws. (See **Award 3523** (Without Referee).)

Here, the Claimant had the burden of proving that Carrier "acted arbitrarily and in violation of the agreement" when it removed his name from the seniority rosters in question. In other words, he had the burden of showing that the Carrier acted on its own motion and without justifiable cause. After a number of readings of the Record we are more than convinced that Claimant failed to prove "arbitrary" and "unjust" removal.

A proper evaluation of all the facts and circumstances peculiar to the record of this dispute shows that the Carrier acted only because the Claimant had already made his inability to return to work a matter of record. In other words, the Carrier acted on the reasonable assumption that one who pleads, argues and proves disabling injuries is actually disabled and unable to return to work. Under circumstances similar to this we held that the Carrier in question was not obliged to carry such an employe on its employment roster, see **Award 1115.** Our reason for invoking this principle was ably stated in **First Division Award 6479** by Referee Johnson. As we view this case, there is no valid reason justifying the failure of the majority to give this principle its intended application because it was firmly established and the Carrier had every reason to rely upon its continued application by the Third Division.

The majority places emphasis on the fact that the letter of December 3, 1954, informing Claimant of the action, was, in essence, an overstatement of what actually occurred prior to the filing of this claim. According to this letter, Claimant's name was removed from the Clerk's Roster because of the "established permanency" of his "total disability," which disability was "alleged and proved" by him (Claimant) during the course of his injury action.

The majority states that this letter was incorrect because at no time did the Claimant specifically allege "total" and permanent disability, nor personally testify as to his inability to return to work. We grant that the specific words used in the letter were not employed by the Claimant. But, from the Record there can be no doubt that what Claimant said, and what others said in his behalf, added up to **"total and permanent"** disability.

In his pleadings, Claimant alleged "disablement," "permanent injury," and his future "inability to attend to his daily occupation." During opening

and closing arguments, his attorney continuously stressed these factors. He personally testified that his condition was getting progressively worse and that as long as it lasted he would be unable to even sit down without suffering agonizing pain, let alone work. He authorized the introduction, and in so doing, concurred in medical testimony which opined that he was totally and permanently injured and that as a result of these injuries, incapable of performing even the simplest types of work. The minority refuses to be swayed by the argument that, for the want of the use of a specific term or action one may evade the consequences of a deliberate and well conceived plan.

Because of the above reasons, we are unconvinced that the Carrier acted arbitrarily and without reason when it removed Claimant's name from the Clerks' Rosters.

Another point of disagrement between the majority and the Signatories to this Dissenting Opinion concerns Claimant's right to reinstatement. Obviously Claimant cannot demand reinstatement unless he is in a position to require Carrier to redetermine his physical condition. We hold that he is disqualified from making any such demand since he previously acknowledged the permanency of his disablement. We also reject the majority's inference that a clear and specific type of statement must be used by Claimant before any such acknowledgment of previous physical condition can be attributed to him personally, so as to bind him in a future action. In **Birmingham Ry. Light and Power Co. v. Hunt,** 76 So. 918, the Court held that in cases where one receives incapacitating injuries, an express averment is not necessary where facts are alleged from which the full extent of the injuries received can necessarily be implied. Also in point is **Sands v. Union Pacific Ry. Co.,** 148 F. Sup. 422, where it was held that one's position on a matter in controversy may be determined by reference to either the pleadings or the proof, it not being essential that the position be specifically set out in the pleadings. And, in **Chicago & E. I. R. Co. v. Collins Produce Co.,** 249 U. S. 186, the Court held that a party is ordinarily estopped to deny full effect and validity to evidence which he has brought into a case.

The above principles, when applied to this dispute, permit us to draw certain conclusions, the most important of which is: the Claimant's position in relation to a particular fact or matter may be determined from an over-all estimate of what is specifically set out in his pleadings, from what he personally states, and from the evidence which he sees fit to offer for consideration and appraisal.

The majority has refused to apply the above principles. It is this refusal which permits it to operate on the premise that the Claimant had the right to relitigate his physical condition, and to reject the application of the doctrine announced in the Scarano Case (**Scarano v. Central R. Co. of New Jersey,** 107 F. Sup. 622, confirmed on appeal to Court of Appeals in 203 F. 2d 510), which case was an important basis for the Carrier's action in this case. Briefly stated, the doctrine announced in the Scarano Case was that a party to litigation would not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of actions.

This rule was obviously intended to implement the general rule that there can be but one recovery, satisfaction, for the same demand, loss or injury. **Adams v. Southern Pacific Co.,** 266 Pac. 541; **Adams v. Cameron,** 150 Pac. 1005. The necessity and morality of such a rule is obvious and, therefore, need not be discussed. A failure to apply either of these rules, when the occasion demands application, is neither wise, nor justified.

The majority here has failed to recognize that the Scarano Doctrine is a special doctrine with special application. Judge Hastie, speaking for the Court, recognized this distinction and referred to it in his Opinion in 203 F. 2d 510, 512 and 513. In failing to recognize that the "estoppel" referred to in the **Scarano Case** was of a special type, not incumbered by the numerous

limitations and qualifications generally applied to the traditional forms of estoppel, the majority has given us additional evidence of its unwillingness to resolve this dispute in light of the applicable facts and controlling legal principles.

We believe that the Claimant is in no position to demand reinstatement, because, as we have previously stated, he has no right to offer evidence connected with his alleged revived physical condition, see **Awards 6740** (Shake), **6215** (Wenke), this Division; **First Division Awards 17191** (Douglass), **16189** (Loring), **15543** (Whiting); **Second Division Award 1672** (Carter).

We also feel that Claimant's personal disappointment with the size of the award rendered did not prevent application of the Scarano Doctrine. In this respect, see **First Division Award 6479**, where Referee Johnson disposed of a similar contention by holding that "not even disappointment in the jury's assessment of the damage can justify the claim that carrier should employ those same services or in default pay for them again."

Finally, we agree with Judge Hastie's statement (see P. 512 of appealed **Scarano Case** in 203 F. 2d) that the Claimant was stopped at the threshold from speculating on the question of whether the jury actually took into consideration evidence relating to his permanent disability.

We hold this Award to be in error and we dissent.

/s/ R. M. Butler
/s/ J. F. Mullen
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp