NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29662
Docket No. CL-30390
93-3-92-3-173

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

"Claim of the Transportation Communications International Union that:

1. Carrier violated the Agreement, particularly Rules 3, 13, 17, 26 and 65, when it refused to allow S. Higdon to return to service on February 1, 1990, and terminated his employment status without just and sufficient cause and a fair and impartial hearing.

2. Carrier shall now be required to return Mr. Higdon to service and pay his lost wages, including overtime that he stood to work and continuing for each subsequent date, as well as any fringe or other benefits which he would have been entitled to as an active employee or furloughed protected employe from February 1, 1990."

FINDINGS:

The Third 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 on June 21, 1976, as a rackman. In 1979, he was injured on the job, resulting in the amputation of his left leg above the knee. He returned to work as a clerk on October 2, 1979, using a prosthesis. On November 11, 1986, while moving boxes at work, the prosthesis buckled under

him and Claimant injured his back. Following this injury, Claimant filed suit under the Federal Employers' Liability Act, and received a judgment in the amount of $500,240 after a jury trial.

On February 1, 1990, Claimant presented a note from his doctor and asked to be returned to work. Carrier refused to permit Claimant to return, thereby precipitating the claim herein.

Carrier urges the Board to apply the doctrine of estoppel and find that Claimant has, effectively, terminated his employment. It points to testimony of Claimant's physicians, as well as statements by his attorneys, which purport to show Claimant is incapable of returning to the Carrier's employ.

The Organization, on the other hand, asserts Claimant's return to work slip from his doctor is sufficient evidence that he is fit. It also argues the judgment awarded Claimant is not consistent with a finding he will never be able to work. Finally, the Organization claims the Carrier was obligated to afford Claimant an Investigation prior to terminating his seniority.

The doctrine of estoppel was summarized by this Board in Third Division Award 6215, which held:

> "The basic philosophy underlying these holdings is there a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary 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."

In the four decades since the issuance of Award 6215, this Board has regularly barred claims for reinstatement and/or back wages based upon the doctrine of estoppel. In Third Division Award 28217, the Board cited Award 2 of Public Law Board No. 3001, which held:

> "It has long been established in many forums that having recovered a verdict for loss of future earnings due to permanent injury a Claimant cannot later take an inconsistent position seeking reemployment. He is estopped from so doing, his recovery having acted to end his employment. Scarano vs. Central

> Railroad of New Jersey, 203 Fed. 2nd 510 (1953) and the numerous awards since relying thereon. In determining whether this type of estoppel applies to the instant matter two factors must be considered: a) the nature of the claim upon which the verdict was rendered and b) the size of the verdict."

If the facts warrant it, we see no reason not to apply the doctrine of estoppel in this case. The analysis, however, requires an intensive review of the record. It is not sufficient that Claimant recovered for an on-the-job injury. Nor is it sufficient that he alleged the injury to be permanent. Certainly, his amputation was permanent, but Carrier permitted him to work. For the doctrine of estoppel to be applicable, Claimant must have argued that his injury will forever bar him from railroad employment in this craft. Further, that position must have been taken either by Claimant, himself, or by his attorneys acting in his behalf.

Although the Board has not been presented with the full record of the court proceedings, there is sufficient documentation available for us to make a determination. We begin our analysis with Claimant's complaint, which was filed on his behalf by his attorneys. As part of their pleading, they alleged:

> "10. That as a result of the defendant's aforementioned negligence, in breach of its duties to plaintiff, the plaintiff suffered severe injuries to his body including but not limited to his lower back and right leg which caused plaintiff to sustain hospital and medical expenses, loss of earnings and earning capacity, loss of fringe benefits, all of which will be incurred in the future.
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> 11. That the plaintiff's injuries are permanent and have resulted and will result in the future in physical pain and suffering, mental anguish and anxiety, fright and shock, denial of social pleasure and enjoyments, physical scarring and disfigurement and embarrassment, humiliation and mortification."

Following the judgment, the Carrier filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial and/or remittitur. Claimant's attorneys filed a brief in his behalf in response to the Carrier's motion, stating:

> "With respect to future employability, Dr. Levine testified on page 80 of his deposition that 'I felt at this point that he probably would not be able to return to work and in fact he may not be able to do any kind of work in the near future or actually in the long future. . . I think it was a high probability at that time.' Dr. Levine testified further that, 'I feel within a reasonable medical certainty that he will continue to have difficulty with the back. With luck, he might get better, but each week I become less optimistic....'"

Regarding the Claimant's return to work as a Computer Operator involving prolonged sitting, feeding the printer and bending and lifting 20-30 pound boxes, Dr. Newman testified that such work would not be the type of activity that the Claimant should return to.

Finally, Dr. Newman's prognosis was that Claimant could "reasonably be expected to experience recurrent problems. . . and that this condition does tend to be a progressive type of condition."

In arguing the jury verdict was not excessive and should not be set aside or reduced, Claimant's attorneys wrote, "The evidence refutes Grand Trunk's claim that the Claimant could return to his job at Grand Trunk." They further wrote:

> "Thus, based on the evidence, the jury could have reasonably concluded that Mr. Higdon was permanently unable to work. On this basis, Mr. Higdon's net-after tax wage loss to date was $44,371.00.. Based upon the average earning of his fellow clerks and the cost of fringe benefits to Grand Trunk adduced in Exhibits 10 and 23, it was reasonable for the jury to conclude that Mr. Higdon would have earned approximately $26,000 after tax in 1988 with the yearly cost of fringe benefits to Grand Trunk of $4,011. Thus with a 5% annual inflation factoring and reduction to present value, Mr. Higdon's expected loss of wages and fringes to normal retirement at age 70 would be $2,229,478.00. This coupled with Mr. Higdon's extreme pain and suffering, loss of enjoyment of social pleasures and mental anguish all point to the reasonableness of the jury's verdict."

Counsel concluded their brief by saying:

> ". . . The damages awarded by the jury were well within the evidence adduced at trial considering the severity of the plaintiff's back injury, and its dire consequences on his life including extensive medical treatment, pain and suffering, loss of activities of life and loss of earning capacity."

Although the jury found that Claimant had suffered damages in the amount of $962,000, it awarded him $500,240 after finding him to have been 48% negligent. It is the higher figure, however, which we must use in evaluating whether the judgment reflects a claim that Claimant would never work for the Carrier again. It is our opinion it does. This is further supported by the above statements of Claimant's attorneys, who obviously argued Claimant had a permanent injury which would render him unemployable.

After reviewing the record, it is the Board's conclusion that the Claim for reinstatement is inconsistent with the position taken, and successfully argued, by Claimant in the FELA case. Accordingly, he is estopped from now asserting he is fit to return to service. Claimant's litigation effectively terminated his seniority with the Carrier, obviating the need for a further hearing.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 7th day of June, 1993.