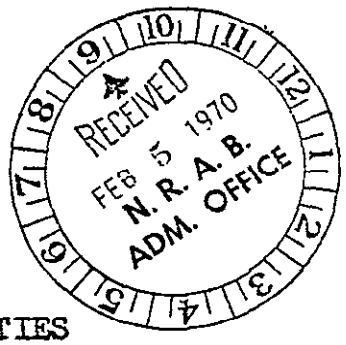

Award No. 2
Case No. 1

PUBLIC LAW BOARD NO. 269

PARTIES TO DISPUTE

UNITED TRANSPORTATION UNION
(formerly Brotherhood of Railroad Trainmen)
and
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
(Western Lines-Northern and Southern Divisions)

STATEMENT OF CLAIM

Request that Brakeman G. C. Hampton's name be placed on the Southern Division seniority roster for Trainmen-Yardmen, District No. 2, and he be allowed pay for all time lost beginning July 24, 1967, and continuing until returned to service, account being mishandled by not being returned to the seniority roster and allowed to take physical examination to determine his physical qualifications for returning to service.

FINDINGS:

The Claimant was severely injured on April 20, 1960 in the course of his employment by the Carrier, incurring a herniated disc in his lower spine and a muscular disability of his right leg commonly called "drop foot". He sued the Carrier for $125,000.00 and on September 19, 1961, the jury awarded him damages in the sum of $100,000.00; on appeal the judgment was affirmed, and was paid on December 3, 1962, with $8,328.00 interest.

On May 7, 1965 at Claimant's request General Chairman John H. Phillips informed Carrier's General Manager, O. H. Osborn, by letter that Claimant had recovered from his injuries and asked to return to work. This request the general manager denied in a letter in which he stated:

> "Mr. G. C. Hampton claimed injury in a derailment on April 20, 1960. Subsequently, he filed suit against this company for damages for permanent injury and obtained judgment in the amount of $100,000.00, which judgment together with interest thereon in the amount of $8,328.00 was paid on December 3, 1962.
>
> "In his suit, Mr. Hampton presented evidence of permanent injury sufficient to incapacitate him from the performance of work as a brakeman or any other kind of work requiring him to perform physical service, all of which resulted in the payment to Mr. Hampton for his loss of future ability to perform

work for this company, and which now estops him from claiming any right to perform service for this company.

"You are, therefore, advised that since Mr. Hampton has been paid for the loss of his future earning capacity, his request for return to service is denied."

The general chairman then requested that Claimant be given a physical examination by Carrier's chief physician "to determine if he has recovered sufficiently to permit him to return to service as a Trainman". This request was denied on June 8, 1965.

Claimant's name did not appear on the seniority list of January 1, 1966, and much correspondence and numerous conferences followed on requests of General Chairman Phillips and Vice-President R. D. Jones of the Organization that Claimant's name be restored to the seniority list and that he be given a physical examination to determine his fitness to return to service as a brakeman. These requests were repeatedly denied, - finally by General Manager Stuppi in a letter of August 29, 1967 to Vice-President Jones in which he said:

"As stated during our discussion of this case, Mr. Hampton alleged a back injury on April 20,1960, and subsequently filed suit against this company for damages for permanent injury, following which he was accorded a $100,000 allowance, together with interest thereon in the amount of $8,328.60 based upon his testimony of permanent disability, which was corroborated by the testimony of his doctor, and urged upon the Court by his lawyer. Based upon these representations of total disability to perform the necessary service required in his normal occupation as a brakeman or any other kind of work requiring him to perform physical service, it is our position he is no longer an employe of this Company due to having estopped himself from his former employment status by the representations made sometime ago.

"Since Mr. Hampton is no longer an employee in our service, the Agreement providing for physical examination of employes by a three-doctor board is not applicable to him. Furthermore, there can be no dispute subject to adjudication by a Public Law Board under the provisions of the Railway Labor Act, as Mr. Hampton's present status is outside of and has no reference to the Collective Bargaining Agreement.

"The two alternatives proposed by you are accordingly declined."

General Chairman Phillips suggested a further conference, and the general manager replied on September 2, 1967:

> "While I have no objection to a further discussion of this item in conference with you and Vice President Jones if you so desire, our position was outlined in my letter to Mr. Jones of August 29, 1967.
>
> "As to docketing this item on the next P.L. Board along with a number of unsettled cases as mentioned by you, our position in this request was also outlined in the last sentence of the penultimate paragraph of my letter of August 29, 1967."

This Public Law Board No. 269 was eventually established, with Dr. Murray M. Rohman, Professor Industrial Relations at Texas Christian University, as procedural neutral. The Carrier withdrew its contention that Claimant was not entitled to a hearing by a board under the Railway Labor Act, but contended that its issue of estoppel was not properly within the jurisdiction of a Board under that Act. This objection was based upon federal court decisions holding that the issue of a claimant's estoppel by suit for and recovery of damages on a claim of permanent disability to perform the duties of his railway employment was not a question of right under a labor agreement, but a question of law paramount to rights otherwise existing under the labor agreement. The Organization pointed out that the Carrier had not raised that contention in NRAB cases. The Carrier replied that when NRAB awards were enforceable only by resort to a federal court it was not necessary to raise that objection before the Board, since it could be raised in federal court; but that it is now necessary because of the 1966 amendment of Section 3 First (p) of the Railway Labor Act which provided that in any federal court suit to enforce an award, "the findings and order" of the Board "shall be conclusive on the parties". It therefore moved to dismiss the matter upon the grounds that the estoppel issue is a matter of law and not of contractual right under the labor agreement and that under Section 3 First (i) of the Railway Labor Act such boards' jurisdiction is limited to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working condictions," etc. The argument is that in claiming and recovering judgment for a total and permanent loss of ability to perform his work for the Carrier, the Claimant is virtually in the position of having voluntarily resigned from its service and having relinquished any rights he might have under the labor agreement.

In accord with awards of the procedural neutrals of Public Law Boards Nos. 169 and 296 the procedural neutral of this Board held the question of estoppel properly referable to this Board, which therefore proceeded to hear the matter on its merits in the Carrier's conference room at Fort Worth on November 26, 1969. The

proceedings were unofficially reported at the Carrier's expense, and copies of the transcript were promptly delivered to the members of the Board.

The current labor agreement as of July 24, 1967, and the award of the procedural neutral herein were introduced as joint exhibits.

The Carrier's exhibits, which were annexed to its submission, are as follows:

Exhibit "A": Pages 15 and 33 of the trial transcript in Claimant's damage action against the Carrier, in which he stated that his employment as head brakeman necessitated his being out in all kinds of weather and required good physical condition, and in response to his attorneys' questions concerning the effect of his injuries, testified as follows:

> "It has crippled to an extent I can't do anything. What I say by anything is get around freely like I used to. It has me crippled to where I hurt constantly, and I have no use of my right foot. I guess that about covers it."

Exhibit "B": A statement by Claimant's physician, Rogers K. Coleman, M.D., dated April 20, 1961, in which he said:

> "It is my impression that Mr. Hampton is completely, totally, and permanently disabled from returning to his former position as an operating employee of the Santa Fe Railway Company."

Exhibit "C": Pages 80, 104 and 106 of the trial transcript, which included the following questions and comments by Claimant's attorney, and answers by Dr. Coleman:

> "Will you tell this Court and the jurors here whether or not, in your opinion, Mr. Hampton will ever be able to return to that occupation as a brakeman, or, for that matter, any occupation requiring manual labor, or lifting, twisting, bending, sitting, for long periods of time?"
>
> "I doubt very seriously that he ever will be able to return to that occupation, either as a brakeman, or any occupation that requires him to lift weights of any appreciable size, or to do repeated bending over and over all day long."
>
> * * *
>
> "Now, Dr. Coleman, you stated awhile ago that while -- I believe this is correct -- while no one could tell

with any degree of certainty about this foot drop, it still has a doubt, at least, and it was your opinion that he could not return to any duties as a brakeman or similar work, is that correct?"

"That's correct."

"You are not testifying, however, doctor, are you, that there is nothing at all in the way of holding a job or earning money that this man could not do."

"That's correct. There is some things he will be able to do."

"All right. Now, there are some things he will be able to do to earn a livelihood in the future."

"That's correct."

* * *

"Is he physically able to do labor, manual labor, the use of his legs and his back to make a living?"

"By the definition of the word I presume you mean lifting things more than ten pounds in weight?"

"Yes, sir."

"Bending frequently during the day?"

"Yes, sir."

"Working an eight hour shift?"

"Yes, sir."

"I don't think so."

"All right, sir. Now, of course, nobody is denying that this man has gotten a whole lot better. For example, the treatments rendered on him got him out of bed and into a wheel chair, and then out of the wheel chair, and on his feet where he can get around with a cane and braces on his back and legs?"

"That's correct."

"That is improvement, is it not?"

"Yes, sir."

"Heaven knows that everybody is grateful for every- that any doctor has done. What I am concerned about

and with, what this jury is concerned about and with, and particularly what Mr. Hampton is concerned with, what he has to look forward to in the future, * * *."

Exhibit "D": Pages 20 and 21 of the trial transcript, which included the following arguments to the jury by Claimant's attorney:

"The court then gives you the issue of the damages which Mr. Hampton has suffered, the loss which he has suffered, and he gives you there the legal element which you should consider under the evidence in this case in determining the amount of money which can in some small way make this man whole, which is the purpose of the law, as poor as it is.

"Now, what is that? What is that, I ask you again? What is the value of a person's health. You have only two doctors who testified in this case, Dr. Coleman from Brownwood, and Dr. Brindley from Temple. You heard the testimony from both of these doctors. I think Dr. Coleman was a very frank witness. I think his testimony was very clear and concise and positive. You have heard the testimony -- you know more about it than I do. You know and I know, and everybody in this courtroom knows, that Mr. Hampton is permanently crippled. Whether his back got a good fusion or not, and willing to hold there seems to be some question about that. There seems to be some dispute about that. Whether he got it or not all the evidence is that this man's back is permanently crippled. They cannot, they cannot any more than we can, make this man back into the man he was before he was thrown from that car. How about this paralysis of the foot; how about the loss of the use of that foot, the wearing of the brace; how does a man feel who is braced from almost his shoulders down to his hips, and from his knees down to his foot; how does it feel to have to carry around steel?

I believe that if those things are so great, if a man can do so well with those things, the Lord would have probably made us out of plastic and steel instead of blood and muscle and bone. This man is ruined from a physical standpoint as we all know. This man, and we all hope and pray he will have some continued improvement, but you know that he will never improve to the point that he can compete as a manual laborer at work which he is trained with other men who are able-bodied. Just as Dr. Coleman said, it is highly improbable that he will ever again be able to do any type of work involving lifting over ten pounds, bending, or stooping,

> or such as that. I ask you,what can a man with a tenth grade education who is thirty-four years of age, * * *."

Exhibits E. F. and G consisted of two decisions by United States Circuit Courts of Appeal and the Award of Public Law Board No. 276 all of which will be referred to later in this Award.

The Carrier subsequently introduced as Exhibit "H", Award No. 20023 of the First Division NRAB, which the Carrier refused to pay and which in 220 F. Supp. 909, the United States District Court for the Northern District of Georgia refused to enforce, and its decision was affirmed by the United States Court of Appeals for the Fifth Circuit in 331 F. 2d. 649 (Carrier's Exhibit "F").

The Organization submitted as its Exhibit "1", a statement of August 1, 1966 by Fred W. Sanders, M.D., of the Fort Worth Bone & Joint Clinic, stating that Claimant "walks without limp or list and heel and toe walks satisfactorily"; that he has "a full range of motion of the lumbar spine". The statement concludes:

> "Status following back surgery with apparent excellent result but with radiographic evidence of pseudarthrosis."

However, the sole issue before this Board is whether by reason of his claim of permanent disability to perform his work as a brakeman, and his recovery of $100,000 on the jury's verdict thereon, he is estopped to claim restoration to the seniority roster for trainman-yardman in District No. 2 of the Carrier's Southern Division, and pay for all time lost from July 24, 1967, until his return to service. Therefore the question of his physical fitness for service is not in issue before this Board.

For that reason Awards 12016, 14218, 15655, 15888, 16482, 17009, 17355, 18466 and 20389 of the First Division, and Award 2500 of the Second Division, NRAB, cited by the Organization on the question of the Carrier's right to remove an employee's name from the roster and refuse him employment on the ground of physical disability are not in point.

In Award 12016 a suit for total and permanent disability was settled for only $7,000, and the question of estoppel was not raised. In Award 14218, Claimant had lost a leg as result of an accident and filed a damage suit which was amicably settled for an amount not stated. He was held entitled to a physical examination to determine his fitness to work as a switchtender.

In Award 15655 there was no law suit, but claimant had retired under 65 years of age for disability, and was held entitled to return to work on proof of recovery from his disability. In Award 15888, the Carrier conceded that suing and recovering judgment

in an unstated amount for personal injuries, was not sufficient ground for termination of services, but contended that the testimony of his medical witness in court proved him unfit for service. In Award 16482, claimant had been awarded judgment for $22,500 for permanent disability, and settled for $21,500. He later proved his physical fitness to return to service. In Award No. 17009 the claimant had sued for "permanent loss of seventy-five percent of the use of his right leg", but settled for $8,500. He then was denied his disability annuity under the Railroad Retirement Act because found "not permanently disabled for work in his regular occupation or for work in all regular employment". In Award 17355 claimant had obtained judgment for $30,000 in a damage suit for injuries claimed to be permanently and totally disabling, but was retained on the roster and proved his physical fitness to resume employment. In Award 18466 there was no law suit, but the employee presented a claim for injuries, which was settled for $11,390. Three weeks later he was examined by the carrier's doctor and approved for return to work. In Award 20389 claimant had filed suit for an amount not stated, and obtained judgment for $22,005.28 for a foot injury which resulted in the removal of part of a toe. In Award 2500 of the Second Division the claimant had sued for $100,000 for injuries which were not claimed or proved to have caused permanent disability, and the jury awarded him only $10,000. In each of these claims it was held that the claimant had proved, or was entitled to a chance to prove, his physical fitness to return to work. In none of them was the question of estoppel raised or decided.

On the question of estoppel the Organization cites First Division Awards 16911, 17454, 17459, 17462, 17500, 17645, 18205, 19276, 19286, 19287, 19288, 19374, 20023, 21039 and 21145.

In Award 16911 claimant sued claiming permanent disability while working as engine foreman, but continued to work for the carrier for about eighteen months as a herder or yardmaster before obtaining judgment for $50,000. Since that fact was placed in evidence the award rejected the carrier's argument that to render such a verdict the jury must have considered the claimant totally disabled.

In Award 17454 the claimant had sued for permanent disability and some evidence was submitted to that effect; but the case was settled for about one-fourth of the amount sued for, by a document prepared by the carrier and signed by the claimant, stating that it was for an accident "as a result of which I suffered many severe and painful bodily injuries".

On that showing the First Division rejected the carrier's contention that the settlement was for permanent injury.

In Award 17459 the claimant had been injured in a collision between his engine and a tank truck. He sued the truck owner alleging injuries which would incapacitate him "for varying

periods of time". There was some medical evidence of permanent disability. But he did not sue the carrier. The award stated that the carrier had an operating rule as follows:

> "An injured employe who has been compensated on the basis of claimed permanent or total disability will not be returned to service until he has been examined and qualified to return to service by the Medical Director or Chief Surgeon of the Railway Company."

The First Division held that claimant was not estopped to claim his seniority right, and furthermore that by the operating rule quoted the carrier had waived the right to claim estoppel.

In Award 17462 the claimant sued the carrier for $150,000 alleging in his complaint that "a substantial part" of his injuries were permanent, but without claiming that they would prevent his employment. Without suit the carrier made a settlement with him for $30,141.50 on a release which did not refer to permanent disability. The award therefore rejected the carrier's claim of estoppel.

In Award 17500 the claimant sued the carrier for $150,000 and was awarded $75,000 by verdict, which the judge reduced to $50,000 on motion for new trial. Three years and eight months later claimant asked to be restored to service and his request was refused. His claim for return to service with seniority rights unimpaired was sustained by the First Division. According to the award he did not claim permanent loss of his working ability as a trainman, but only that he had suffered certain permanent injuries and resulting pain and "has been and at present is unable to perform his regular occupation as a railroad flagman and brakeman"; that he did not ask the jury to find him permanently disabled for his employment, but only that they consider whether his injuries were permanent in nature and "how far they are likely to disable him from performing his regular duties"; that upon such a record it could not be determined that the $50,000 judgment was intended to compensate "for disability of a 29 year old trainman for his entire lifetime from return to his employment."

In Award 17645 claimant sued for $100,000 on the ground that he was informed and believed that he would be permanently incapacitated to work as a railroad man; but the jury awarded him only $30,000. The First Division said:

> "If claimant, as carrier asserts, has been paid by this judgment for the full value of his services for any particular time or for the full period of his life expectancy, then he had no right to return to service.

"* * * We think carrier has failed to show that claimant has been paid for permanent disability.

* * *

"We think the essential elements of estoppel do not appear. Claimant's pleading and testimony as to future disability were not assertions of fact but of opinion based on information and belief."

In Award 18205 the claimant sued for $75,000. Several months before the trial the carrier's physician examined him and certified that he was physically able to return toservice. The jury awarded him $5,000.

The First Division ruled that the case did not contain the essential and primary elements of equitable estoppel.

In Award 19276 claimant sued the carrier for an amount not stated and obtained a judgment for $16,000. The First Division said:

"We find that the doctrine of estoppel does not apply in this case because (1) there is no evidence that the jury awarded claimant damages for total and permanent disability and, (2) because we sit as an administrative body to interpret the provisions of the agreement between the Brotherhood and the carrier and to apply those provisions to the facts in the case and render our decisions accordingly."

Thus it sustained the claim partly because there was no evidence that the $16,000 was awarded for total and permanent disability, and partly on the ground that the Board had no jurisdiction except to interpret the labor agreement; in other words, that the issue of estoppel was beyond its jurisdiction, which has been decided to the contrary by the procedural neutral of this Board.

In Awards 19286, 19287 and 19288, all with the same referee, the First Division said:

"It has been said, and properly so, in many of the awards of this Board that our consideration of a case must be limited to the rules of the agreement and their application to the facts in the case as presented in the docket, which is supplemented by briefs and oral argument."

* * *

"It has been held that the same rules of res judicata and collateral estoppel apply in an

> administrative proceeding following a court judgment that would apply in a second court action between the parties, but only as to the parties to the record in the court proceeding.
>
> "Let us keep in mind that when an employe brings a cause of action against a carrier he does so under the Federal Employer's Liability Act and the parties to that cause of action are the employe and the carrier. When a claim is presented to this Board it is under the Railway Labor Act and the parties to the claim are the petitioner (the union) and the carrier. Therefore, the parties in the case before us are not the same as the parties in the court case."

In other words, estoppel was not considered because it was beyond the Board's jurisdiction and also because the Organization was not a party to the damage suit in federal court.

In Award 19374 the amount sued for is not shown, but the judgment was for $30,000. The Board ruled that the carrier had waived the objection of estoppel by making the claimant three conditional offers of reinstatement.

In Award 21039 the claimant had obtained a judgment against this Carrier for $28,750. The award does not state the nature of his injuries or the amount sued for. The First Division said:

> "The Carrier's defense against the claim is on the ground that the claimant is estopped from seeking restoration to service after having declared himself permanently injured.
>
> "Within the context of estoppel, the question would be not whether the claimant represented himself to be permanently injured -- for a permanent injury may still be of a minor nature--but whether he represented himself to be permanently incapacitated from performing his railroad occupation. The record before the Division is not persuasive that the latter representation was probative.
>
> "Without establishing aprecedent regarding estoppel as it may or may not apply in other cases, and confined strictly to the particular facts and circumstances of this case, we hold that the claimant's name should be restored, in accordance with his claim, to the seniority roster."

In Award 21145 the nature of the injuries and the amounts sued for and received in settlement are not stated. The Board said:

> "Carrier contends that claimant is estopped from asserting a right to resume active service because of representations made by him or in his behalf concerning the nature and extent of his injuries. Carrier takes the position that such representations were the equivalent of declarations and an offer of proof that claimant was permanently incapacitated from performing his railroad occupation, and that such representations formed the basis for the settlement. We are not persuaded by the record before us that such is the case here. For, while representations were made which strongly indicate the existence of a permanent injury, there is a distinction between a permanent injury and an injury which permanently incapacitates one from performing his occupation. See Award 21039.
>
> "Without establishing a precedent regarding estoppel as it may or may not apply in other cases, and confined strictly to the particular facts and circumstances in this case, we hold in regard to Claim (a) that claimant's name should be restored to the roster with seniority date as last shown thereon."

In Award 20023 also the nature of the injuries and the amounts sued for and recovered are not stated. This was prior to the 1966 amendment of the Railroad Labor Act. The Board said:

> "We have now before us the question of whether there is any merit in carrier's contention that claimant is 'estopped' by the record in his suit for damages under the FELA and this, too, is an issue well settled by a substantial line of prior awards. (15888, 16482, 17355, 17454, 17459, 17462, 17500, 18205, 18486, 19276, 19286, 19374) We must follow the opinion expressed in these awards that seniority rights and the right to work in accordance with them are matters of contract which are unaffected by the civil action in suing for damages under the FELA, absent a positive contrary showing proving the carrier has obtained, in settlement thereof, a right to terminate seniority, or to withhold a man from service. No proof is offered in this record that would bar consideration of this claim.
>
> "On the record presented to us we must find that the claimant was unjustly withheld from service on and after May 12, 1959, and order that he be restored to service, seniority unimpaired, with payment for all time lost."

The carrier refusing to comply with the award, claimant Jones filed suit in the United States District Court for the Northern District of Georgia to enforce it. That court entered judgment of dismissal (200 F. Supp. 909), and the claimant appealed to the United States Court of Appeals for the Fifth Circuit, which in a unanimous three judge decision (331 F. 2d 649) held the award void and affirmed the district court judgment. The facts stated in the Court of Appeals decision outline the case.

Claimant Jones was injured while working as a switchman and filed suit against the carrier for an amount not stated in the decision, claiming that he was permanently disabled as result of the injuries and would be unable in the future to perform railroad work as a switchman or to perform any other type of railroad work. At the trial he submitted proof of these allegations. The jury brought in a general verdict in his favor for $21,850. The carrier then removed his name from the seniority list without notice to him. About two years later the claimant had a surgical operation, after which his claim was filed for reinstatement to the service with seniority unimpaired and pay for all time lost after that date.

In its decision the United States Court of Appeals said:

> "The respondent (carrier) contends that the petitioner is estopped from pursuing his claim for reinstatement and pay for lost time, and from showing that he is now physically able to resume work as a switchman. In support of its contentions the respondent points to the complaint, trial, jury verdict, judgment, and payment by it of the amount of the jury verdict in the Superior Court of Fulton County, Georgia, wherein the petitioner alleged, proved and collected for injuries which he claimed permanently disabled him from performing railroad work as a switchman or any other manual work. It is contended that to require respondent to re-employ petitioner with back pay would be unconscionable and that petitioner, under the law, may not take such inconsistent and contradictory positions with the respondent; * * *."
>
> * * *
>
> "The question presented to us is whether the District Judge committed error in refusing to enter judgment enforcing the award of the NRAB and in sustaining the respondent's contention of estoppel by granting motion of respondent for summary judgment and denying the petitioner's cross-motion for summary judgment. The opinion of the District Court is reported in 200 F. Supp. 909. We affirm."
>
> * * *

"The Trial Court did conclude that when an employee alleges and successfully proves in such a suit that he is permanently injured and disabled, rendering him unable in the future to perform the work of a switchman, or to do other manual labor,and is compensated for lost wages 'past, present and future' and the railroad company pays the full judgment pursuant to such a lawsuit, the railroad is not bound as a matter of law to retain the employee in its services with back pay. The Court grounded its decision on collateral estoppel. In our opinion the reasoning of the Trial Court is sound from a moral and a legal point of view in the circumstances of this case. Davis v. Wakelee, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578; Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, affirming, D.C.Pa., 107 F.Supp. 622; Wallace v. Southern Pacific R. Co., D.C., 106 F.Supp. 742; Buberl v. Southern Pacific R. Co., D.C., 94 F. Supp. 11; Ellerd v. Southern Pacific R. Co., et al., D.C., 191 F.Supp. 716, Restatement, Judgments, Sections 45 & 68 (1942), 19 Am. Jur. Section 74, page 712.

The judgment is affirmed."

The second case cited above, Scarano v. Central R. Co. of New Jersey, is the other United States Court of Appeals case cited by the Carrier as its Exhibit "F". It also cited as Exhibit "G" the award of Public Law Board No. 276, in which the claimant had sued the carrier for $115,360.09 and recovered judgment for $47,000, which was paid with interest. The board ordered the claim dismissed in its award, in which it said:

"Despite Petitioner's contrary contention, the real party in interest herein is the claimant even though Petitioner has processed the instant claim on his behalf. Consequently, the Petitioner is acting in a representative capacity, and the parties are in reality the same as those involved in the previous civil court action.

"Although the civil court action filed by claimant was based upon a charge of negligence, the questions considered by the court necessitated consideration of credible medical evidence, including prognosis as to claimant's permanent injury and total disability to perform the duties of his former position with Carrier, to determine whether or not he was entitled to recover for loss of future earnings and for future suffering likely or probably to be incurred as a proximate result of injuries suffered by him. Even though the final judgment rendered was less than

claimant initially sought in the civil court action, the amount was substantial and far in excess of his loss of earnings and expenses incurred at the time of trial. Despite the fact that the jury did not render specific allocations as to the various items for which compensation was sought, the verdict in the amount of $47,000.00 clearly reflects compensation for both past loss of earnings and diminished prospective earnings resulting from claimant's total disability to perform his former duties as a Switchman as opposed to less physically strenuous work.

"In summary, the record in this case convinces this Board that claimant or his representative introduced evidence during the civil court action calculated to convince the jury that claimant was permanently incapacitated from performing his regular duties with Carrier, and that the resulting judgment reflects an award by the jury for permanent loss of opportunity to work as a Switchman. Carrier's conclusions as to claimant's physical disqualifications were predicated on the credible representations offered in evidence during the court action concerning the extent of claimant's physical impairment, and Carrier's refusal to reinstate claimant under these circumstances was neither arbitrary or capricious.

"Careful analysis of various precedents relied on by both parties requires us to conclude that the particular facts involved herein are most comparable to those found in Jones v. Central Georgia Railway Company, 220 F. Supp. 909 (1963), in which the court held that the claimant was estopped from seeking reinstatement and back pay for time lost under similar circumstances. This decision was affirmed by the Fifth Circuit Court of Appeals in Jones v. Central Georgia Railway Company, 220 F. 2d, 649 (Fifth Cir., 1964). Accordingly, we must conclude that claimant herein is estopped from now urging that he was wrongfully discharged by Carrier in violation of his contractual rights, and the claim will be dismissed."

This case also is most comparable to the Jones case and is governed by the principle there declared by the United States Court of Appeals; in fact that principle is even more impelling under the facts of this case. Claimant sued for $125,000 and was awarded $100,000, 80% of the amount sued for, over four times the verdict in the Jones case, more than double the amount involved in the above award of Public Law Board No. 276, and much more strongly indicative of the jury's intent to compensate for the loss of future earnings in railroad employment.

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It is suggested that $100,000 cannot properly be considered as compensation for the loss of wages at $9,000 per year for the 32 years which claimant might have been able to work before retirement under the Railway Retirement Act. But ordinary computations show that at 5% interest, even without compounding, the $100,000 judgment would be nearly three-fifths, and at 6% nearly two-thirds of the amount necessary to pay the wages for the entire period; and the compounding of 5% or 6% interest over a period of 32 years would considerably increase the effect. It must also be borne in mind that not all earning power was claimed to have been lost, but only the ability to perform usual railroad services and other manual or physical labor. Certainly the judgment was adequate to finance training for other work, if necessary.

It is therefore our conclusion that the claim must be denied. As the various cited awards point out, each case is dependent upon its own facts, and this conclusion is not in conflict with them except for those which hold, contrary to pronouncement by the courts, that the carrier is not in general entitled to raise the estoppel issue.

AWARD: Claim denied.

Howard A. Johnson

Howard A. Johnson, Chairman

J. R. Jones, Carrier Member

R. D. Jones, Employee Member

Dated Fort Worth, Texas, February 24, 1970.