PUBLIC LAW BOARD NO. 2774

Award No. 136
Case No. 136

PARTIES TO DISPUTE — Brotherhood of Maintenance of Way Employees
and
Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM

"1. That the Carrier was in violation of the provisions of the current agreement when it failed to refuse to allow Bridge and Building Mechanic, Mr. L. R. Shavers, Sr., to occupy his former position after being released by his attending physician for unrestricted duty.

2. That the Carrier now return claimant to his assigned position of Bridge and Building Mechanic and compensate him for all wage loss suffered commencing with April 12, 1984, and continuing until he is allowed to return to service."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant herein was injured in an accident which occurred in October of 1978 while asleep in an outfit car during work. Subsequently, when no settlement was achieved through direct negotiations, claimant filed a suit against Carrier in Federal District Court under the Federal Employees Liability Act. Following a jury verdict, claimant was awarded $476,030. A later appeal by Carrier to the United States Court of Appeals was denied. Subsequently, in March of 1984 claimant was examined by two physicians and both of them released claimant to return to his normal position without any physical restrictions. Carrier refused to accept claimant back based on the fact that he had been found to be totally and permanently disabled and foreclosed from returning to work for Carrier.

Examination of the record herein indicates that claimant's attorney made representations to the jury which were supported by medical evidence that he was prevented from working for Carrier because of the seriousness of the injuries which he had

received. There have been numerous prior situations in which similar attempts to return to work by employees disabled in accidents after court findings have been considered. The Boards have consistently ruled that employees cannot "have it both ways" (see for example Award No. 10 of Public Law Board No. 1493). The thrust of the many decisions on this subject essentially is that an employee cannot take the position, which is mutually internally contradictory, that at one point he is unable to work and, therefore, seeks monetary relief from Carrier and, upon receiving that relief, then indicates that he is able to work without any physical restrictions. Such inconsistency would be not only incorrect but also would be contrary to public policy and law. It has been held by Federal courts that one who recovers a verdict based on future earnings arising from permanent injuries is estopped from claiming the right to future reemployment (Jones vs. Central of Georgia Railway Company - USDC ND CA, August 13, 1963).

This Board is of the opinion that claimant herein, having established to the satisfaction of a jury that he was entitled to compensation against future earnings, can now not go back and try to achieve at the same time again those earnings. Therefore, the claim must be denied.

AWARD

Claim denied.

I. M. Lieberman, Neutral-Chairman

G. M. Garmon, Carrier Member

C. F. Foose, Employee Member

Chicago, Illinois
May 7, 1985