PUBLIC LAW BOARD NO. 436

PARTIES TO THE DISPUTE:

Southern Pacific Company (T&L Lines) AWARD NO. 1
and
United Transportation Union (S) CASE NO. 1

STATEMENT OF CLAIM:

Request that Switchman Donald Leidenheimer in New Orleans Terminal be allowed to return to work and claim is made for all time lost from November 19, 1968 until this seniority restriction is removed.

STATEMENT OF FACTS:

Claimant was employed as a switchman with this carrier from 1948 until November 13, 1960, on which date he sustained personal injuries in the course of his employment. Subsequently, on November 28, 1961, he was operated on for removal (bilateral) of the fourth lumbar ruptured disc. He returned to work in March of 1962 and worked off and on until June of 1962 when he again laid off because of his back pain. Claimant filed suit against the carrier under the F.E.L.A. for damages arising out of his accident of November 13, 1960 and at the trial of the case in December of 1962, the carrier admitted liability, the case was submitted to a jury for determination of the amount of damages and the jury returned a verdict in favor of claimant in the amount of $70,000.

On March 14, 1968, some 6-1/2 years later, claimant contacted the carrier's superintendent and requested that he be re-assigned to his former job of switchman. The carrier denied his request on the ground that claimant was estopped from seeking reinstatement by reason of his allegations and proof in the court case in connection with permanent disability, loss of future earnings, etc. and his receipt of a substantial amount of money as damages predicated thereon.

A grievance was subsequently processed on behalf of claimant, claiming reinstatement rights under the collective bargaining agreement with a claim for time lost subsequent to November 19, 1968.

The carrier returned to the United States District Court and requested a declaratory judgment that claimant be estopped from seeking reinstatement. On February 27, 1969, the court dismissed the carrier's complaint without passing upon the merits of the estoppel argument, and solely on the grounds that the claim for reinstatement and the defense of estoppel lay within the

exclusive jurisdiction of the National Railroad Adjustment Board. The parties thereupon took steps to establish this Special Board of Adjustment.

FINDINGS:

Numerous authorities going in both directions have been submitted by the parties in connection with the general question of applicability of the doctrine of estoppel in cases of this type. The carrier, in support of its position, relies heavily upon the case of Scarano v. Central R.R. Co. of New Jersey, 203 F.2d 510 (3 Cir. 1953) and in its brief has quoted some excerpts from that opinion. A reading of the entire report of the Scarano case is instructive. Reviewing the particular facts of that case, it appears that the plaintiff alleged that he was "totally incapacitated from resuming his former occupation or from engaging in any other form of labor." Plaintiff's doctor testified that he was "totally disabled" and that his "condition will become progressively worse should he attempt" any work involving "the normal range of use of the back that is usually required in any physical effort." Scarano recovered a judgment of $27,750, and he applied for reinstatement within one month after the judgment. In this connection the court made the following statement:

> "The period of time of future wage loss intended to be compensated for * * * was much more than one month. We are not unmindful that in a situation of this type where a greater period of time has elapsed between an ambiguous judgment for settlement and an application for reinstatement, there may be a factual question as to whether the recovery enjoyed by the plaintiff was intended to compensate him for longer than the elapsed period."

The court in the Scarano case emphasized that the estoppel which it was applying is to be distinguished from a traditional estoppel in pais since important prerequisites of that concept were lacking since the defendant did not believe and rely on plaintiff's statements as to his physical condition. It is clear that the type of estoppel applied in Scarano is what is sometimes referred to as the doctrine of "judicial estoppel". This doctrine of "judicial estoppel", its peculiarities and limitations, is discussed in 31 C.J.S. (Estoppel) and the following quoted excerpts from certain sections under that heading are important to any understanding and application of the doctrine:

> "Section 117. It may be enough that the party intended to play fast-and-loose with the court by intentional self-contradiction as a means of obtaining unfair advantage."

"Section 121. It has been said that the purpose of the doctrine of judicial estoppel is to suppress fraud * * *"

"In order for the doctrine of judicial estoppel to be applicable, the party against whom the estoppel is urged must have made a statement of fact, and the doctrine may not apply where the statements were merely conclusions of law or assertions of opinion."

"Section 122. It has also been said that the doctrine can never find application unless there has been what is equivalent to a specific and categorical denial of that which has been affirmed, unaccompanied by any reasonable explanation of the discrepancy, and unless it appears that the previous statement was not only untrue but was wilfully false in the sense of conscious and deliberate perjury * * *."

A careful review of the Scarano decision and the other cases cited by the carrier in which the doctrine of estoppel has been applied makes it clear that the courts, on the particular facts presented, have held against the plaintiff actually on two separate and different grounds. First, the courts have felt that the very brief period of time elapsing between the judgment in the personal injury action and the application for reinstatement makes it clear the plaintiff's categorical allegation of permanent inability to return to his job was intentionally fraudulent and they will apply the doctrine of "judicial estoppel" to suppress such fraud. Secondly, and entirely apart from the "judicial estoppel", they hold that, again based upon the very brief interval between the judgment and the application for reinstatement, it is clear to them that the jury's award was large enough to include compensation for future wage loss in excess of the elapsed period. On this basis it is held that reinstatement and return to the payroll within that short period of time will result in duplication of recoveries.

The Scarano court was careful to emphasize that "in applying this rationalization each case must be decided upon its own particular facts and circumstances" and we proceed to so analyze the facts of the present case to determine whether claimant should be barred either on the doctrine of "judicial estoppel" as outlined above or on the ground of duplication of recovery.

A review of the facts will indicate that on each controlling element the present case is completely distinguishable from the Scarano case. The quoted excerpts from the Scarano opinion above indicate that in the personal injury case the plaintiff and his doctors categorically claimed that he was totally disabled and could not return to his job in the future. No such allegations were made by claimant in the present case. It is true that he alleged permanent injuries, and indeed his injuries are permanent since his back will obviously never be as strong as it was prior

to the accident, and the doctor's report upon which he based his claim for reinstatement conceded that "he is slightly more vulnerable to injuries in the lower back than an individual who has never had a ruptured disc." While his testimony made it clear that he did not feel able to return to work at the time of the trial, he did not claim total permanent disability. A careful review of the entire testimony of claimant's doctor at the trial will indicate that he did not state that claimant could not return to his job as a switchman. On the contrary, he merely testified that he advised against such a return because of the risk of re-injury and in one section of his testimony there is a basis for the jury concluding that claimant would have about a 50-50 chance of successfully returning to his job. This testimony appears at pages 83 and 84 of the transcript of trial testimony as follows:

> "I felt that he would not be able to return to that skilful heavy work even if he had an operation. Why do I say that, I say that because although it is possible that he could have, as we know, as I mentioned, after a patient's disc operation they reorganize themselves, bilateral ruptured disc, half of the patients do return to heavy work but half of them don't. Now, one doesn't know whether the patient in front of you will be able to withstand the strain successfully. In other words, how do we know when people return back to work, Mr. Leidenheimer goes back to work, back as a switchman and he successfully does this. Then we say the operation is successful. But if he is not successful, he has reinjured his back and then he has increased disability. * It is my position that a ruptured disc operation is not a curative operation. The only curative or successful in half of patients. Since we have no way of feeling whether they will or not, I advise that the best medical treatment is to face the patient with the figures of telling him we don't know whether you will or not. If in view of the circumstances, financially, socially and individually such that you must go back, it is your decision, you have to do this, but if the circumstances are such that you do not have to, if you can change occupations to a lighter job, you can live happily and well for years. So my advice to all the patients always has been their decision as to whether they want to go back to heavy work or not."

The foregoing testimony contrasts sharply with the categorical testimony of the doctor in the <u>Scarano</u> case stating that the plaintiff there was totally disabled and that his condition would definitely grow progressively worse should he attempt any work requiring physical effort.

So too the attempt of the plaintiff <u>Scarano</u> to brazenly reclaim his job rights one month after such testimony by him and by his doctor contrasts sharply with the 6-1/2 year period off the

job which the present claimant went through prior to feeling sufficiently recovered to seek reinstatement. On this record there is certainly no evidence of "intentional self-contradiction" or statements by claimant which could be characterized as "wilfully false in the sense of conscious and deliberate perjury" and it must be concluded that there is no basis for invoking the doctrine of "judicial estoppel" on the facts of this case. (See 31 C.J.S. Estoppel Sec. 122)

It further appears that it will be impossible in this case to declare with certainty that the period of time of future wage loss intended by the jury to be compensated for was more than the period which actually elapsed from the date of the judgment to the date of application for reinstatement. Plaintiff was awarded $70,000, a sizable sum to be sure, but when the many elements of damages submitted to the jury are borne in mind, it is impossible to determine what portion was figured as future wage loss. Claimant had lost approximately two years from work as of the date of trial, had undergone severe pain and suffering and there was evidence that this would continue into the future. He had undergone serious and painful operative procedures and he had sustained an injury to his back which was obviously permanent in some degree. At the time of the injury he was earning approximately $5500 per year. At that time he was 29 years of age with an employment expectancy of at least 36 years. His time off the job from the date of the injury to the date of the claim herein was approximately 8-1/2 years. Under all the circumstances this appears to be the exact type of case hypothesized by the Scarano court and expressly distinguished when it stated:

> "We are not unmindful that in a situation of this type where a greater period of time has elapsed between an ambiguous judgment or settlement and an application for reinstatement, there may be a factual question as to whether the recovery enjoyed by the plaintiff was intended to compensate him for longer than the elapsed period."

On this record no finding of a duplication of recovery can be made.

Under all the facts and circumstances of this case we conclude that the carrier's defense of estoppel must fail and as of November 19, 1968, claimant had a right to claim reinstatement and the carrier then had an obligation to reinstate him to service or to have him submit to a physical examination as provided in Article 46 (Rule 55) of the applicable Agreement. This rule reads as follows:

"ARTICLE 46 (Rule 55). Physical Re-Examination

Physical re-examination requirements for switchmen will be as follows:

(1)	(2)	(3)
Ages	Ages	Ages
18 to 54	55 to 64	65 and over
Biennial	Annual	Every Six Months

When it is obvious that a switchman is physically affected in a way that impairs his service, the Carrier is privileged to hold that switchman out of service, if necessary, and have him examined. Where a switchman is held out of service by the Carrier and required to undergo physical examination and it is found, in the opinion of the Carrier's medical staff, that he is unable to perform service and the individual questions that diagnosis, he will be privileged to have a doctor of his own choosing examine him, and in case of disagreement between his doctor and the Carrier's surgeon, they shall select a third doctor and the decision of the majority of the three will be final. If it is determined by the majority of the three that the man's condition did not warrant his being held out of service, he will be returned to service and paid for time lost.

If a switchman is held from service for an examination or for alleged impaired physical condition and upon examination is found to be physically fit to resume duty, he will be paid for time lost.

Physical re-examination required by Transportation Rules as now set out in Form CS-5606 will not be extended except by agreement.

Switchmen will be expected to respond to the above regulations and the examinations will be conducted as nearly as practicable to avoid loss of time by employees."

In the light of the seriousness of claimant's injury, the carrier should certainly be entitled to invoke the provisions of Article 46 (Rule 55) and the award will so provide. If, after completion of the physical examination procedure, it is determined that claimant is physically fit to resume duty, the rule expressly provides that he will be paid for time lost as the result of being held from service. The carrier requests that outside earnings should be deducted from any damages

assessed in this case, but it is well established by many decisions of the First Division and other Boards that outside earnings are not deducted in the absence of proof of some past practice to that effect on the particular carrier involved. In the present case it is established that the past practice on this property does not allow deduction of outside earnings.

AWARD:

The carrier shall promptly notify claimant to appear for physical re-examination under the provisions of Article 46 (Rule 55). If, after completion of the examinations contemplated in Article 46 (Rule 55), it is determined that claimant is physically fit to resume duty, he shall be reinstated without loss of seniority and shall be paid for all time lost from November 19, 1968, to the date of reinstatement.

Paul D. Hanlon, Chairman & Neutral Member

J. D. Davis, Carrier Member

G. T. DuBose, Organization Member

Houston, Texas

Jan. 19, 1970