PUBLIC LAW BOARD NO. 3543

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION UNITED STATES DISTRICT COUNCIL FOR RAILROADS	AWARD NO. 7
and	
THE LONG ISLAND RAIL ROAD COMPANY	Bates Administrativ Termination

Statement of Claim:

"1. That, the Carrier violated the Current Agreement, when Carrier Administratively terminated Sheet Metal Worker J. Bates, effective, April 15, 1985, without benefit of a trial or hearing, Namely Rule 51, Entitled: Discipline.

"2. Carrier violated Appendix "F" Section 22 which provides the inalienable right to due process; before deprivation of his vested interest.

"3. That accordingly, the Carrier be ordered to make the aforementioned J. Bates whole by restoring him to Carriers' Service, with all seniority rights unimpaired, make whole for all vacation right, holiday, sick leave benefits and all other benefits that are a condition of employment unimpaired, and compsated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under Health and Welfare and life insurance agreements during the time he has been held out of service."

Background:

On December 2, 1981, while working as a pipefitter in Carrier's Electric Car Shop, the herein Claimant, Mr. John H. Bates, fell from a Ballymore Hydraulic Scoffold and sustained injuries to his left ankle and left wrist. He was taken, by ambulance, to Queens General Hospital where the ankle and the wrist were placed in casts. The casts remained on for about nine weeks. Following the accident Bates was placed in a "disabled/accident" status by the Carrier and was paid sick leave benefits as provided by the parties Agreement

On May 24, 1983, the Grievant, who had not returned to work following the accident, was examined by Dr. Joseph S. Mulle', who concluded, in a statement dated June 1, 1983, that Bates:

"... has a permanent disablility as a result of the fracture of the left ankle."

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Additionally, Dr. Mulle' offered an opinion that:

> "... the patient is disabled for occupation as a sheetmetal worker in view of the severe limitation of motion in the foot at the talocalcaneal joint."

On November 19, 1983 Bates was examined by Dr. Phillip M. Evanski, Carrier's Orthopedic Consultant. Dr. Evanski's report on the examination stated in part:

> "Patient ... is unable to do work which would require prolonged standing, walking, and climbing. Carrying any weight would also be difficult without further danger of injury."

With regard to possible corrective surgery to correct the condition, Dr. Evanski stated his opinion to be:

> "It is unlikely that any surgical procedure will fully restore the patient to activities such as climbing or standing for eight hours. Limitation of motion will persist despite any surgery performed."

On January 11, 1985 Bates was examined by Carrier's Medical Director. In this examination the Medical Director found that Claimant was"

> "... medically unable to perform the duties that are assigned under the scope of the Sheet Metal Workers' Agreement ..."

Three days later, on Junary 14, 1985, a trial commenced on an FELA suite Mr. Bates had filed against the Carrier in 1983. During the course of the trial on this suit Dr. Frank P. Vaccarino, an orthropedic surgeon, certified by the American Acadamy of Orthorpedic Surgery, testified with respect to Bates' physical condition. The substance of this testimony was that Bates was unable to perform the duties of a pipefitter under the Sheet Metal Workers' Agreement or work any other type of job that would require strenuous physical activity on his part. At the conclusion of the trial the jury returned an award in favor of Bates in the amount of $450,000.00.

On February 15, 1985 Bates was again examined by Carrier's Medical Director, Dr. Howard Leaman. In this examination Dr. Leaman determined that Bates was not capable of performing service for the Carrier and entered the following remark in his progress report:

> "Foot not changed in condition - cannot perform as a sheet metal worker."

On April 15, 1985 Carrier's Chief Mechanical Officer wrote

Bates a letter indicating that his employment relationship was being terminated "through the process of administrative termination." The expressed basis for this action was stated to be:

> "This decision was reached after conversing with the Medical Director and Law Department as to the possibility of your returning to duty as a Pipefitter. The Medical Director found you medically unable to perform the duties that are assigned under the scope of Sheet Metal Workers' Agreement after examining you on January 11, 1985. This permanent disability was reiterated in testimony on your behalf during a liability suit heard in the United States Eastern District Court commencing on January 14, 1985."

On April 24, 1985 Bates' Local Chairman protested the administrative termination. In that protest it was stated:

> "This organization rejects your position in this matter and strongly objects to the application of this form of discipline without due process being afforded Mr. J. J. Bates."

Also, it was contended that Rule 51, the parties discipline rule, was breeched in this matter.

The protest of the Union was discussed in conference at which time the Organization argued that Bates was dismissed from service without a fair and impartial investigation. It was further contended that a "Board of Doctors" should be established to determine the physical consdition of Bates with regard to his ability to work as a pipefitter. These arguments were rejected by the Carrier in a letter dated June 12, 1985.

On August 5, 1985 further appeal was taken to Carrier's Director - Labor Relations. That appeal again requested that a board of doctors be established to determine Bates' fitness to return to duty as a pipefitter.

In September 1985 the appeal was rejected. The basis of the denial was stated to be:

> "In light of the fact that three medical doctors determined that Claimant could never perform the duties of his position, Carrier administratively terminated him."

The Positions of the Parties:

The Carrier's Position:

Carrier contends that it was not an Agreement violation to

administratively terminate Bates' employment relationship because it was medically determined that he was unable to work as a pipefitter under the Sheet Metal Workers' Agreement. Claimant, Carrier argues, is estopped from ever seeking reemployment as a pipefitter with Carrier because the primary thrust of his argument in his FELA trial was that he would never again be able to work at his trade. After hearing the case, the jury returned a verdict in favor of Bates which awarded him damages of $450,000.00. This award covered Bates past and future wage losses due to the injury.

Carrier contends that it was not necessary for it to establish a three doctor medical panel to examine Bates because no dispute exists concerning his physical condition. Bates' own physician has indicated that he is unable to work as a pipefitter under the Sheet Metal Workers' Agreement. A specialist that testified at his FELA trial has also indicated that he cannot do work in that occupation. And the Chief Medical Officer for the Carrier has made similar determinations.

With respect to administrative termination, Carrier has argued that such action is not subject to the investigation, trial and discipline provisions of the Agreement because Bates was not let go for disciplinary reasons - his termination was merely the removal of a name from a roster of an individual that is physically unable to work his job now and he will never be able to do so in the future because of his physical condition.

In support of the foregoing contentions the Carrier has cited a number of Awards of various tribunals. It argues that NRAB-Third Division Award 6215, NRAB-First Division Award 6479, NRAB-Second Division Award 9921, NRAB-Third Division Award 23830 and Award 21, PLB 1660 (BRAC v. LIRR) all support the proposition that once an injuried employee has successfully contended in a Federal Court action that he is to be allowed payment because he is permantly disabled he is not thereafter entitled to be retained on the seniority list.

Carrier also contends that NRAB-Second Division Award 8676, NRAB-Third Division Award 18512, Award 26, SBA 230 (BLE v. LIRR) and Award 2, PLB 3407 support the proposition that the Carrier has the right to determine the physical fitness of its employees.

With respect to the practice of administrative termination Carrier cites Award 1, PLB 3407 (BRCA v. LIRR) and Award 1A, as well as NRAB-Third Division Award 24967, which it contends grants license for such action in such circumstances.

The Position of the Organization:

The Organization makes four points in its argument that it was not proper for Carrier to administratively terminate Mr. Bates employment relationship. First it is argued that Carrier's action

is supterfuge. Next it is contended that the alleged medical disqualification circumvents Appendix F, Section 15 of the Agreement. Third, it is the position of the Union that Appendix F, Section 22 was violated because Bates was denied "due process." And, fourth, Rule 60 was violated when Bates employment relationship was ended.

At the hearing the Organization argued that the award of the jury was reduced by fifty percent because of contributory negligence of plaintiff and out of the remaining amount Bates was required to compensate his attornies for their fees and expenses. Thus, he did not receive a settlement of "close to a half a million dollars" as suggested by the Carrier.

It was also pointed out that Mr. Bates was now participating in a physical therapy program and with progress this would restore adequate agility in his ankle so that he would in time be able to return to service as a pipefitter and do his job without any physical problems.

It was also argued that Carrier erred when it did not establish a medical board to determine Bates physical fitness and that under the circumstances involved here administrative termination is improper. In support of its contentions that administrative termination is not proper under the Agreement the Union relies upon two awards of Public Law Boards dealing with employees working in other crafts on the LIRR. Award 1, PLB 3998 and Award 1 of PLB 4037 considered cases where employees represented by the UTU were administratively terminated for physical reasons. Both terminations were set aside by the Referee considering those matters.

Findings:

Public Law Board No. 3543, upon the whole record and all of the evidence, finds and holds that the Employee and the Carrier are Employee and Carrier within the meaning of the Railway Labor Act; that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

There are a number of decisions and awards of various Railway Labor Act tribunals that have concluded that an injured employee is collaterally estopped from urging that he has been wrongfully discharged by a carrier when he was not allowed to return to service following receipt of a monetary verdict in an FELA case wherein the employee, through his attorney and expert medical testimony, persuaded the court and/or jury that he was entitled to compensation because he was permanently incapacitated from performing his regular duties. For example, in NRAB-Third Division Award 13524 the Board stated:

> "The Carrier contends that the Claimant is estopped from pursuing his claim for reinstatement, and in support of

"its contentions cites the fact of the judgment and payment by the Carrier of the amount of the jury verdict in the United States District Court at Cleveland, Ohio wherein the Claimant was compensated for injuries which he claimed permanently disabled him from performing his duties as a laborer in the Clerical Groups referred to.

"In the circumstances found we must conclude that when a Claimant successfully establishes in a suit in the United States District Court that he is permanently injured and disabled, rendering him unable in the future to perform the work of a laborer, and is compensated for lost wages, 'past, present and future.' and the Carrier pays the full amount of the judgment pursuant to the judgment rendered in the case, the Carrier is not bound to retain the employe in its serices with back pay."

An identical result obtained in Second Division Award 7976. In that Award several Federal Court decisions touching on this issue were discussed in detail. Hear the Division stated:

"Carrier;s affirmative defense raises a case of estoppel. The Court of Appeals in Scarano v. Central RR of New Jersey, 203 F 2d 510, expressed the rule as:

> 'a plaintif who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish a second claim inconsistent with his earlier contentions. Such use of inconsistent positions would most flagrantly exemplify that playing fast and loose with the courts which has been emphasized as an end the courts should not tolerate.'

"'Sacrano' was followed in Jones v. Central of Georgia Ry. Co. (USDC ND. Ga.) 48 LC par. 1856, which case involved Carrier's refusal to apply First Division Award 20 023 which had sustained therein a claim of an employee who, as here, had suffered an on-duty injury. Jones filed suit under the Federal Employers' Liability Act to recover and alleged therein that he was permanently disabled. The jury found in Jones' favor. After the monetary satisfaction had been reached, Carrier removed his name from the seniority roster. Jones grieved and sought restoration of his seniority and pay for time lost as a result thereof. His claim was ultimately sustained by the NRAB's First Division Award 20023. Carrier refused to comply therewith. The Northern District Court of Georgia held:

> "'It seems to this Court the applicable rule of law is firmly established that one who receives a verdict based on future earnings the claim of which arises because of permanent injuries, estops himself thereafter from claiming the right to future re-employment, claiming that he is now physically able to return to work.'
>
> "Similarly, the Courts in Wallace v. Southern Pac. Co., 106 F Supp. 742 (21 LC par. 67,213); Burbank v. Southern Pac. Co., 94 F Supp. 11 (18 LC Par. 65, 925); Sands v. Union Pacific Railroad, 148 F. Supp. 422, (31 LC Par. 7043), among other cases followed this legal rationale."

The decision in "Jones" was endorsed in Third Division Award 22598. "Jones" was also relied on in Third Division Award 23830 wherein the Board considered and denied a claim involving issues similar to those before use here. Also cited in Award 23830 were "Scarano," "Wallace" and "Sands" as well as Pendleton v. Southern Pacific Co., USDC, ND. Cal. (1952) 21 LC par. 8683) and Chavira v. Southern Pacific Co., USDC, ND Cal. (1960) 42 LC, Par. 16970).

Thus it seems that with the exception of First Division Award 20 023 (which was denied enforcement in the courts in "Jones," supra) and Second Division Award 3837 (where a financial settlement was reached by negotiations in the course of which the carrier sought to obtain a resignation but abandonded these efforts, thus, recognizing that a return to service might well be requested) Adjustment Board and Public Law Board awards are uniform in applying the docturn of collateral estoppel and are uniform in concluding that the Agreement is not violated when an employee is refused permission to return to work following receipt of payment in a court award in which it was conclusively demonstrated in his behalf that he was permanently disabled for work in his regular occupation.

With regard to the matter of removal from the seniority roster in such circumstances notice is taken of Second Division Award 5511. In that case a Sheet Metal Worker was awarded $165,000.00 in settlement of a suit filed against his employer under FELA. Approximately 10 months after the conclusion of the litigation the injured man, in possession of a return to work statement from his personal doctor, requested that he now be given his job back. The Carrier refused reinstatement on the basis that his:

> "... employment relationship with the Carrier had been relinquished by and through representations made by him and on his behalf during the course of his damage suit against the Carrier."

And after analysis of the record, the Board stated that it was convinced that the claimant in that case had persuaded the jury that he was permanently incapacitated and unable to work in the Sheet

Metal Workers' Craft. The Award continued:

> "... that Claimant is estopped from now urging that he was wrongfully discharged by Carrier in violation of his contractual rights ..."

From the foregoing it seems clear that the weight of authority, both arbitral and Federal Court decisions, support a conclustion that it is not an Agreement violation to deny an employee permission to return to service after he has prevailed in an FELA action wherein it was contended that he was permantly disabled as a result of an on-duty injury. What remains to be examined then is whether or not it is an Agreement violation to effect an administrative termination, which constitutes removal of an individuals name from the seniority roster, as was done in the Bates grievance. Both parties have submitted awards which which they contend support their respective positions on this facet. We will look at those submitted by the Carrier first. One authority relied upon by the Carrier is Award No. 1, PLB 3407 (LIRR - Carmen) (Marx). In that case the Board stated:

> "The Claimant's medical status is not directly at issue before the Board. What is at issue is that the Organization contends that the Claimant was terminated in violation of Rule 50 which states that 'Employes will not be suspended nor dismissed from service without a fair and impartial trial." The Organization in particular disputes the Carrier's right make an 'administrative termination' as cited in the Chief Mechanical Officer's letter.
>
> "The Carrier argues that there is no medical disagreement as to the Claimant's condition, which prevents him from performing work in circumstances essential to the Carmen craft. The Carrier argues further that it was obligated to prevent further medical complications to the Claimant, which could be accomplished only by withholding him from work on a permanent basis. The Carrier emphasizes that the Claimant is not accused of any misconduct or rule violation, and so the termination is not disciplinary and thus Rule 50 is inapplicable.
>
> "The sentence quoted above from Rule 50 would appear to indicate that there may be no terminations without a trial. Further review shows, however, that Rule 50 is solely concerned with disciplinary matters. It falls under Section III of the Agreement between the parties, which section refers in its title to "Discipline'.
>
> "A trial, by obvious defination and by specific reference within Rule 50, goes to the determination of guilt or innocence of a charge. There is no 'charge' against the Claimant and thus a 'trial' would be to no effect. The Organization's reliance on Rule 50 in this instance is not supported by the intention and content of the rule itself.

"Likewise, the Organization's reliance on Public Law Board No. 3072, Awards 1A and 2, is not in point. These were instances in which employees had earlier been retained in service on a 'last chance' basis and where upon alleged repetition of misconduct, were terminated without further trial. These awards concluded that second trials were mandated. But these were clearly disciplinary in nature, unrelated to the case under review here. Other cases cited by the Organization were to similar effect in relation to disciplinary action.

"On the other hand, it is crystal clear that the rules in general (seniority, etc.0, as well as the ongoing bargaining relationshop between the parties, denies to the Carrier the right to terminate employees at will -- by 'administrative' or other means. Where such right to be granted, it would strike at the heart of the employee security protected by union representation.

"The Board perceives that the dispute here is more a matter os semantics than of rule provision. What actually occurred, undisputed in any way, is that an employee was found -- by his own physician -- to be unable to perform certain phases of his work (that involving exposure to dust and fumes). The Carrier cannot be expected simply to ignore such restriction. The Carrier further determined (and this could be subject to dispute by the Organization) that the Claimant's inability to perform his work under certain circumstances made him unavailable for work in his normal assignment.

"It is not for the Board to suggest how the Carrier shall administer its obligations under the Agreement. However, less forbidding than so-called 'administrative termination' would have been a medical finding showing the employee unfit for duty which would have put him out of service. If the employee felt this was not justified, Rule 53 (Grievance appeals other than discipline) provides for proper avenue to file a claim (within 30 days).

"In actuality, the claim progressed by the Organization, while concentrating on alleged improper failure to provide a trial, did concern itself with the Claimant's physical condition. An offer was made to provide the Claimant with alternate employment, which would have required a seniority waiver by the Union. This the Union, understandably, was not in a position to grant, in view of its effect on other employees.

"The use of the phrase ' administrative termination' does not clothe the Carrier with the unilateral right to remove employees from service. The Carrier acted well within its proper discretion, however, in withholding the Claimant

"from service indefinitely based on the report of the Claimant's physician, confirmed by the Carrier Medical Director. Any alleged improper treatment on this basis could have been the subject of a Rule 53 grievance.

"The Claimant was not improperly denied a trial under Rule 50. To defuse any concern about the misunderstood 'administrative termination', the Board will determine that the Claimant shall have 30 days from the date of this award to provide medical evidence concerning his ability to perform his job. Should medical disagreement occur between the Claimant's and the Carrier's physicians, reference to a board of physicians would be appropriate (for more on this, see Award 1-A). If such evidence is not supplied or a board of physicians disqualifies the Claimant, the claim is denied. If medical evidence satisfactory to the Carrier is timely provided or a board of physicians qualifies the Claimant, he shall be reinstated with full seniority but without pay or retroactive benefits."

From this it would seem that "administrative terminations" are not proper subjects to be handled under the discipline provisions of the Agreement when the "administrative termination" does not concern itself with discipline. And irrespective of what the Board stated its views to be with the underlying concept of "administrative termination" such action on the part of the Carrier would be proper if medical evidence is not supplied indicating that the individual was capable of working his job. (It is only improper if the individual is capable of working his assignment.)

Significantly, though, it is noted that Award 1, PLB 3407 did not involve a situation wherein the individaul claimant had participated in an FELA suit contending that he was permantly incapacitated. Award 1, thus, did not deal with a situation involving the doctrine of collerateral estoppel.

The Carrier also relies on Award 1A of the same Board. In Award 1A the Board indicated that the matter was a "parallel case to Award No. 1. The three paragraph opinion reads:

"The Board incorporates here its conclusions concerning the inadequacy of the use of 'administrative termination' as an action which can stand by itself, without more, to support removing an employee from service. Likewise, the Board finds that in the circumstances here under review, the Organization's reliance on Rule 50 is misplaced.

"The Carrier has a right to determine the fitness of its employees for duty, subject to challenge, of course under the grievance procedure. In this instance, the resolution appeared at hand when the Organization requested the convening of a Board of Doctors to review the medical status

"of the Claminat. The Carrier agreed to such procedure, but the Organiztion subsequently withdrew its request.

"As in Award No. 1, there is no finding of violation of Rule 50 by failure of the Carrier to provide a trial. The Organization, for whatever reasons, determined not to have the Claimant's status reviewed by a Board of Doctors. Nothing further is required of the Board."

When Award No. 1A is read closely with Award No. 1 it is clear that notwithstanding certain verbage in the opinions that might, standing apart from the whole, be read with differing results the end result of the matter is that an administrative termination occured, the Union, there, had an opportunity to dispute the medical basis for the termination by submitting the matter to a medical board and this was not done, thus the administrative termination continued to stand.

Additionally, the Board determined that the Agreement was not violated because the Grievant was not provided a disciplinary trial. Also as in Award 1, there is no showing that the individual involved was a participant in an FELA suit wherein it was contended that an on-duty injury caused his total disability.

Two cases were furnished us by the Organization. Both followed the Marx decisions and make reference to certain dicta therein. Award No. 1, PLB 3998 (Towmy) concluded that on "the facts of record in this particular case" Carrier did not have a unilateral right to terminate the Grievant. Careful study of the decision, though, seems to indicate that it is founded on determinations that the Grievant was not disqualified "from other job classificationswhere he held seniority." Additionally, there is not a showing that the Grievant was involved in an FELA matter where it was contended that he was totally and permanently unable to work because of on-duty injuries and that he had been awarded compensation for past, present and future earnings, thus creating a collateral estoppel situation. These differences make Award 1, PLB 3998 distingishable from the instant case.

Award 1, PLB 4037 is the second case relied on by the Union. In that case we do have an involvment of an FELA suit. The Claimant here was awarded $50,000.00 in her trial. At the time of the award her base annual pay was $31, 1[illegible].00 with additional fringe benefits of $21,062.00. From the amount of the award ($50,000.00) the Claimant was responsible for reimbursement to the Carrier for all benefits paid her while on sick leave due to the on-duty injury. However, there is more. The Claimant reported to Carrier's Medical Department for a return to work physical. The Medical Department authorized her return to duty but before obtaining an assignment she was notified that she was administratively terminated. It is also of importance to note that at her FELA trial Claimant's physician did not take the position that she was permanently disabled from work. Moreover, the Claimant herself, never alleged that she considered herself permanently disabled from working her job.

These facts, with the testimony of two orthopedic specialists indicating that nothing prevented the Claimant from working makes Award 1, PLB 4037, distingishable from the matter we are considering and it is not surprising that the Board held that the administrative termination was not appropriate in such circumstances. The Board in Award 1, PLB 4037, stated:

> "We find that Carrier's factual basis for its administrative termination as set forth in its June 24, 1985 letter is not supported by the record before this Board. Accordingly, the Carrier's contention based on estoppel are untenable and totally devoid of merit in this particular case."

When the findings in Award 1 are considered in connection with our record a different result obtains. On our record Carrier has made a convincing case for estoppel. The difference between the award of the two juries is notable - $50,000.00 v. $450,000.00, the testimony of expert medical authorities suggests permanent injury in one case and an ability to return to duty in the other, and, in Award 1 the Claimant was authorized to return to work while in the instant case Bates was found to be medically unfit to work his job.

After careful study, we must conclude that even though Award 1 was furnished us by the Organization in support of its position it really supports Carrier's arguments that an individual that contends that he is permanently disabled from working his regular job because of an on-duty injury and collects substantial damages in FELA litigation becomes estopped from later seeking reassignment in his old job.

If there is any doubt that an employee such as Bates is estopped from returning to work after seeking and receiving a substantial settlement on a contention that he is permantly disabled a closer look at "Scarano" quickly dispells it. In "Scarno" the Claimant applied for reinstatement with the Carrier and the Carrier refused to reinstate or examin him to determine physical condition. The Claimant brought suit alleging breach of contract. The Carrier moved for summary judgment on the grounds that the earlier FELA suit barred the claimant from any further compensation. The District Court granted summary judgment and the Claimant appealed to the Circuit Court of Appeals. The Appellate Court affirmed the judgment saying:

> "Nor is the estoppel relied on here equivalent to 'collateral estoppel'as that term is used in Restatement of Judgments. The concept gives to the determination of actually litigated issues by valid and final judgment conclusiveness in all further litigation between the same parties. RESTATEMENT, JUDGMENTS, Sec. 63 (1942).

"Since, on the present record, there is substantial dispute as to what the former judgment decided about plaintiff's physical condition, collateral estoppel cannot be employed at this state. If in the tort action there had been a finding of fact or an answer to a specific interrogatory to the effect that plaintiff was disabled either permanently or for some specified period of time, and if final judgment had been rendered thereon, there would be no question but that collateral estoppel would bar either party from relitigating that issue against the other. Even had judgment been entered on the general verdict actually rendered in the tort case, rather than on a subsequent settlement, so that what the judgment determined was indentical with what the verdict determined this case might have been an appropriate one for the use of collateral estoppel.

"1. The District Court stated that 'A reading of the record in (the tort action) can leave no doubt in the mind mind of any reasonable person that the jury's verdict was based substantially on future loss of earnings capacity.' While we may take this as a finding that the basis of the jury verdict is so clear that the trial judge would be justified in withdrawing that question from a jury in the present case, the relevant fact necessary to the invocation of collateral estoppel is the basis of the judgment. (See Restatement, Judgments, Sec. 45, comment (c) 1942).

"The 'estoppel' of which, for want of a more precise word, we here speak is but a particular limited application of what is sometimes said to be a general rule that 'a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or successive series of suits.' II FREEMEN ON JUDGMENTS Sec. 631 (5th ed. 1925). Whether the correct doctrine is that broad we do not decide. The rule we apply here need be and is no broader than this. A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. See Stretch v. Watson, 1949, 6 N.J. Super 456, 469 69 A (2d) 596, 603, rev'd in part on other grounds, 5 N.J. 268 74 A (2d) 597. And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."

And when "Scarano" is read along side of "Sands," a case with a slightly different bent, the same result not only obtains but is reemphasized. In "Sands," as in "Scarano," the Grievant was refused reemployment and denied the opportunity of asserting prior seniority to a job in his craft. Initially the Grievant filed a dispute with the NRAB but while it was pending there a suit was entered in the U.S. District Court in Oregon. The Court upheld the action of the Carrier in refusing Sands' seniority and reinstatement. The Court stated:

> "The leading authority for this estoppel is Scarano v. Central R. Co. of New Jersey, supra, an action for wrongful discharge in which the plaintiff had sued and recovered for permanent injury in a prior action. The court stated that, '(a) Plaintiff who had obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. '203 F.2nd 510, 513 (23 LC Par. 67,549).
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> The only basis for distinguishing this case from Scarano which has been offered by Sands is that the personal injury complaint in that case alleged permanent injury, while his own complaint alleged injury for a definite period only. I cannot accept this as an adequate basis for distinction. For the purpose of the Scarano rule, it is immaterial how Sands assumed his earlier inconsistent position whether by pleading or proof. The essential facts are that he assumed it and obtained relief on the basis of it. Since both these facts exist, the Scarano rule applies and Sands is estopped from maintaining in this case that he is physically capable of returning to his old job.
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> The justice of this result is apparent when one considers the dilemma facing the railroad when Sands asked to return to work. The Carman's job involves heavy labor. It is no job for a man with a bad back. As early as 1947, Sands had strained his back and was being treated for arthritis. The railroad allowed him to continue on the job but he strained his back again in 1950. Under these circumstances, and in view of the medical testimony, it was not only possible but probable that Sands' cronic back injury would soon recur if he were permitted to come back on the job. If it did, the railroad might face a claim for damages for additional aggravation of his cronic back condition."

We are also convinced that the rationale of "Scarano" and "Sands" is not isolated. Award 9 of PLB 1795 (BMWE v. SP) dealt with this same concern. After concluding that the rationale of "Scarano" was sound the Board stated:

> "Recognizing that over 23 years have elapsed since the Scarano case was decided; we have researched the pertinent authorities to determine whether the principles enunciated in that case have since then been modified or overruled. We find to the contrary. On the facts and principles there involved Scarano is accepted as the leading case on the proposition of estoppel and has been cited with approval and followed in may later decisions.
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> "See for example, among others:
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> Ellerd v. So. Pac. R. Co., 191 F. Supp 722 (1961)
> Hodges v. Atlantic Coast Line RR co., 238 F. Supp. 425 (1964).
> Gibson v. Missouri Pac. RR Co., 314 F. Supp 1211 (1970)
> Gleason v. United States 458 Fed. 2d 171, 175 (1972)
> City of Kingsport, Tenn. v. Steel & Roof Structures, Inc., 500 Fed. 2d 617, 620 (1974)
> Duplar Corp. v. Deering Milliken, Inc. 387 F. Supp 1146, 1178 (1975)"

The Board, in Award 9 made additional comment with regard to the Gibson Case:

> "In the Gibson case, supra, the controlling principle was stated succinctly as follows:
>
> 'It is a sound principle that an employee is estopped to assert a right to return to work after pursuing an FELA claim in which he holds out his inability to work and recovers a large sum of money in satisfaction of his claim.'"

From all of the foregoing it is clear that Adjustment Board and Federal Court decision uniformly hold that an employee is estopped from asserting a right to return to work when the fact circumstances match those of Bates, our Claimant here. Accordingly, when an employee is demonstrably estopped from asserting a right to return to work it is our view that administrative termination is not inappropriate and does not breach just cause standards as contained in the Agreement. The administrative termination of Mr. Bates will not be disturbed.

(16)

AWARD

Claim Denied.

John C. Fletcher, Chairman and Neutral Member

Carlton J. Welch, Employee Member

David D. Morrison, Carrier Member

Dated at Mt. Prospect, IL. this 6th day of November, 1986