

PUBLIC LAW BOARD NO. 3775

TRANSPORTATION COMMUNICATIONS :
INTERNATIONAL UNION :

"Organization" :

Case No. 65

vs. :

CONSOLIDATED RAIL CORPORATION :
"Carrier" :

Award No. 35

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood

(CR-3838) that:

- (a) The Carrier violated the Clerical Rules Agreement, effective, July 1, 1979, particularly Rules 1, 4, 5, 9, 14, 18, 42, 49 and other Rules in effect when, the Carrier failed to permit Claimant L. L. Gilhuly to return to active service on August 27, 1986.
- (b) That Claimant L. L. Gilhuly now be allowed eight (8) hours pay at the appropriate pro-rata rate for each day withheld from service, beginning August 27, 1986, and continuing for each and every successive date, as well as any other compensation that would have been due for or otherwise available to Claimant during the aforementioned period account this violation.
- (c) This claim is presented in accordance with Rule 45 and should be allowed.

OPINION OF THE BOARD

The Claimant, Linda Lambert Gilhuly, was assigned as a clerk in the Regional Transportation Office, Detroit, Michigan. On October 4, 1982, the Claimant allegedly injured her right knee

while working when she bumped it on a table. On October 22, 1982, while leaving an elevator in the Detroit office building on crutches, the Claimant allegedly fell and injured her back and right knee.

The Claimant then initiated a civil law suit against the Carrier under the Federal Employers Liability Act (FELA). This action was filed in the Third Judicial Circuit, Circuit Court for the County of Wayne, State of Michigan. In her complaint, and throughout the trial, the Claimant sought compensation for past and future wage loss due to her injuries. After deliberation, the jury returned a verdict of \$260,000.00 against the Carrier. The Order of Judgement, entered on September 5, 1986, was a general verdict and did not specify for what purposes the jury awarded the verdict of \$260,000.00.

The Carrier appealed the verdict. At the time of the hearing before this Board, said appeal was still pending.

Due to her injuries, the Claimant was on sick leave from work at the time of her trial. On August 26, 1986, however, the Claimant reported to the Carrier with a note from a physician stating that she may return to work as of August 27, 1986. The Carrier denied the Claimant's request to return to work. The Carrier advised the Claimant that since she recovered a verdict of \$260,000.00, which represented future wage loss based upon her claim of permanent and disabling injuries, she was estopped from continuing her employment with the Carrier, and as a result her name was removed from the seniority roster as if she had

voluntarily quit.

The Carrier conducted no investigation independent of the trial prior to making this determination and removing the Claimant from the seniority roster.

The Claimant filed a subsequent claim which was processed on the property. When the matter could not be resolved, the Organization placed the claim before this Board.

Rules, cited by the parties, state in relevant part:

Rule 14 - Seniority Date

(c) Seniority can only be established and exercised as provided under the terms of this Agreement. The parties signatory hereto have full authority to jointly decide any questions affecting seniority.

Rule 16 - Seniority Roster

(c) No change on seniority rosters will be made by the Company without conference and agreement with the Division Chairman. Copies of all rosters will be furnished the General Chairman and the appropriate Division and Local Chairmen.

Rule 18 - Reducing Forces and Displacement Rights

(d) An employee whose position is abolished or who is displaced from his permanent position shall exercise seniority to positions not requiring a change in residence as defined in Section 501 (9) of the Act within ten (10) calendar days, or forfeit all seniority except as provided in Rule 11, or in case of personal illness, vacation or unavoidable causes, the ten (10) calendar day period will be extended proportionately to the extent of such absence. An employee entitled to exercise seniority in accordance with the foregoing, but who is unable to do so due to the fact that no position is available, will be considered furloughed.

Rule 42 - Investigation

(a) An employee who has been in the service more than sixty (60) calendar days or whose application has been approved shall not be disciplined or

dismissed without a fair and impartial investigation. He may, however, be held out of service pending such investigation only if his retention in service would be detrimental to himself, another person, or the Company. The investigation shall begin within ten (10) calendar days of the date when charged with the offense or held from service and completed as soon as possible. A decision will be rendered with fifteen (15) calendar days, in writing, after completion of investigation, copy to Local Chairman.

Rule 50 - Incapacitated Employees

(a) Efforts will be made to furnish suitable employment to employees who have become physically incapacitated to continue in service in their present occupation.

The Carrier's position concerning this claim is as follows: The Claimant received compensation for her future wage loss through the jury verdict, and now attempts to "double dip" by returning to work and earning future wages. Such an inconsistent action by the Claimant is prohibited under the theory of judicial estoppel, which is applicable to this case. The Claimant clearly claimed during her trial that she was permanently disabled. The jury just as clearly accepted her argument and issued her a large monetary award that includes compensation for lost future wages. In these circumstances, numerous decisions by Public Law Boards and Courts have held that application of the judicial estoppel theory is appropriate, and that because the matter is not one of discipline, the Rules Agreement does not apply. Accordingly, the claim must be denied.

The position of the Organization is as follows: as a result of the Claimant pursuing her FELA claim, the Carrier stripped her of her seniority in violation of numerous Rules. Rule 42 (a) was

violated when the Carrier terminated the Claimant without a hearing. Rule 14 (c) and 16 (c) were violated when the Carrier removed the Claimant's seniority without the required conference with the Division Chairman. Additionally, Rule 50 (a) was violated as the Carrier did not make the required efforts to furnish suitable employment after consideration of her physical problems. Moreover, for numerous reasons, the Carrier's reliance on the theory of judicial estoppel is misplaced. Precedent clearly establishes that before judicial estoppel may be applied, the Carrier must hold an investigative hearing and pay damages awarded for a permanent and complete disability. None of those things happened in this case. Accordingly, the claim should be sustained.

This Board has concluded that the claim must be sustained in part.

The Carrier has clearly established that a judicial estoppel theory exists in the railroad industry and has been applied numerous times. As the often quoted language of Third Division Award 6215 explains:

"The basic philosophy underlying these holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy."

Having acknowledged that judicial estoppel is a viable

concept, it does not automatically follow that it is applicable in this case. This Board, like other bodies, believes that judicial estoppel should be applied with caution, and only where clearly warranted by the facts.

The Board has determined that judicial estoppel is not applicable under the facts of this case.

Carrier's appeal of the jury judgment rendered in favor of the Claimant is an act inconsistent with the assertion of judicial estoppel. Language of many awards, including that of the First Division Award 17191 (Douglass) makes clear that it is "the payment of the judgment" that may create estoppel where warranted. Here, there has been no payment of the judgment in favor of the Claimant. It is possible that the judgment could be reversed on appeal. In that circumstance, the Claimant would be both without the judgment and without seniority for a job with the Carrier.

Accordingly, Carrier had no basis to unilaterally strip the Claimant of her seniority without regard to the Rules Agreement. It follows that the Carrier committed numerous violations of the Rules. Those violations included Rule 42 (a), for terminating the Claimant without a fair and impartial investigation, Rule 16, for removing the Claimant from the seniority roster without conference and agreement with the Division Chairman, and Rule 50 (a), for not making efforts to furnish suitable employment to the Claimant.

Accordingly, the claim has merit. As a remedy, the Claimant

shall be reinstated to the seniority roster without loss of seniority. As to that portion of the claim seeking pay and benefits for time lost, that matter is referred back to the parties to determine when, if at all, the Claimant was physically capable of returning to do work that she was entitled to by her seniority under the contract. Although the Claimant contended that she was capable of returning on August 27, the Carrier was not obligated to accept automatically her contention in that regard. The record in this case is now barren of evidence from which this Board could determine whether the Claimant is, or at any time since August 27, 1986 has been, physically capable of returning to work.

AWARD

Claim sustained in part as set forth above.

John C. Campbell

J. C. CAMPBELL,
Organization Member
7.21.88

R. O'Neill - Carrier

R. O'NEILL,
Carrier Member

S. E. Buehheit

S. E. BUCHHEIT,
Neutral Member