File: 104-1187-T
16-32(84-199)T

Public Law Board No. 3897

Parties to Dispute

Brotherhood Railway Carmen of the United States and Canada

vs

Seaboard System Railroad

Case No. 5

Award No. 5

STATEMENT OF CLAIM

1. That the Seaboard System Railroad Company, hereinafter referred to as the Carrier, was in violation of the Agreement when it failed to restore Carman E. E. Monhollen, hereinafter referred to as the Claimant, to service in accordance with the decision rendered in Public Law Board No. 3067, Award No. 2, Case No. 2.

2. And accordingly, the Carrier should be ordered to compensate Claimant for all time lost subsequent to March 20, 1984 when he was released by his doctor to return to work on his regular assignment.

3. And that the Carrier should be orderedto reinstate the Claimant to service in accordance with the findings of Public Law Board No. 3067.

FINDINGS

On August 14, 1979 an investigation was held to determine facts and establish responsibility, if any, in connection with the Claimant's alleged gambling with a number of fellow workers while on duty. Since the Claimant refused to answer questions posed to him by the hearing officer at this investigation, apparently on counsel from his attorney, he was charged with insubordination. An investigation on this second charge was held on September 18, 1979. As a result of this latter investigation the Claimant was found guilty as charged and dismissed from service. Appeal and adjudication of this discipline was finalized on December 17, 1982 by Award No. 2 of Public Law Board No. 3067 when the Claimant was reinstated to

service with seniority unimpaired but with no back pay.

According to the record, which is not disputed by the Organization, the Carrier made a good faith attempt to implement this Award after it was rendered in December of 1982. After the Carrier experienced some difficulty locating the Claimant he and his Local Chairman came to the General Foreman's office on January 28, 1983 and at that time the Claimant was instructed to see the Claimant's physician for a return-to-work-physical on that day prior to 5:00 P.M. The Claimant did not keep that appointment and, according to the record, "...local (Carrier) officials were unable to contact(the Claimant) thereafter".

It appears less than coincidental to the Board that the Claimant did not keep his doctor's appointment on January 28, 1983. It also appears less than coincidental that he apparently refused to give the Carrier proper information on where he could be reached during the weeks following the Award of Public Law Board No. 3067. Less than a week after the missed January 28, 1983 appointment the Claimant was pleading to a jury in Federal Court at Louisville, Kentucky through evidence offered by his personal physician and pleadings by legal counsel that he was disabled and would never again be able to perform the physical duties of a railroad Carman. Such evidence and conclusions were proffered to the court as the alleged result of on-the-job injuries received by the Claimant in February and October of 1978 and in May of 1979. In a sworn deposition on August 4, 1981 the Claimant's physician expressed an opinion "... with a reasonable degree of medical certainty" that:

> ...as of this time (the Claimant) can no longer perform this type of work. He will require surgical intervention to his low back to restore him to a situation where he can be gainfully employed, but even with this surgery, I doubt if he can perform heavy manual labor such as (is required when performing the duties of a Carman).

This deposition was presented to the court as was another by the same physician which was dated August 16, 1982. This latter one

stated that after two subsequent visits by the Claimant no new information was available to warrant that the physician change his diagnosis of the Claimant nor his view that there was a "causal relationship" between the accidents suffered by the Claimant in 1978 and 1979 and his continuing disabled condition. On February 4, 1983 the Claimant's attorney stated the following to the court:

> (N)ow the (Claimant) can't work at all. He winds up in surgery and everybody agrees that he is totally disabled from the work he really knows. (emphasis added)

After the Claimant lost his suit in Federal Court and after a pending appeal was withdrawn by his attorney on March 15, 1984 a "To Whom It May Concern" medical form, dated March 20, 1984, was forwarded to the Carrier wherein it was stated that the Claimant had now sufficiently recovered to return to "regular employment". This medical form was signed by the Claimant's same personal physician whose depositions before the court claimed that the Claimant was medically disabled. On July 19, 1984 the Carrier's Chief Medical Officer medically disqualified the Claimant from further service. The instant case centers on the refusal by the Carrier to return the Claimant to work after March 20, 1984.

The instant record clearly shows that the Claimant made attempts to sabotage the Carrier's efforts to implement Award No. 2 of Public Law Board No. 3067 until it became legally clear to him that he would not win his liability suit against the Carrier in Federal Court. Only five days after this suit against the Carrier was abandonned the Claimant proceeded to bring forth evidence to suggest the opposite conclusion relative to his permanent disability than he had sought in court. Given these facts this Board is estopped from rendering a sustaining Award in the instant case by long and consistent precedent which is found not only in railroad arbitration Awards but also in decisions by the courts. The doctrine of estoppel has been succinctly stated in Third Division Award No. 6215 of the National Railroad Adjustment Board, to wit:

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> The basic philosophy underlying (such) holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions,with respect to the same subject-matter in 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.

(See also First Division No. 20166; Second Division No. 1672, 7967)

Pertinent to the instant case the courts have established, in Jones v. Central of Georgia Ry. Co. (USCD ND. Ga) 48 LC par. 1856 that:

> It seemsto this Court the applicable rule of law is firmly established that one who recovers 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.

Given the evidence of record the claim must be denied.

AWARD

Claim denied.

Edward L. Suntrup, Neutral Member

J. T. Williams, Carrier Member

R. P. Wojtowicz, Employee Member

Date: 1-25-86