

Award No. 3253
Docket No. 3014
2-NYNH&H-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Coach Cleaner Francis X. Goode was unjustly dismissed from the service of the carrier on March 8, 1957.

2. That accordingly the carrier be ordered to restore Coach Cleaner Francis X. Goode to service with all rights unimpaired, and with compensation for all time lost since March 6, 1957.

EMPLOYES' STATEMENT OF FACTS: Coach Cleaner, Francis X. Goode, hereafter referred to as the claimant, was employed by the carrier at the South Boston Passenger Car Yards, South Boston, Massachusetts, for a period of approximately 9½ to 10 years, on the 4:00 P. M. to 12:00 Mid. shift. By letter of February 26, 1957, Mr. T. L. Gorman, general foreman, South Boston, Passenger Car Yards, elected to summon the claimant to appear for a hearing in his office, at 10:00 A. M., February 28, 1957.

This hearing was subsequently postponed, at request of claimant, to and held on March 6, 1957.

On March 8, 1957, by letter of that date, Mr. T. L. Gorman, general foreman, notified the claimant that he was removed from the service of The New York, New Haven and Hartford Railroad Company.

This dispute has been handled with all of the officers of the carrier up to the highest designated railroad officer to handle such disputes without satisfactory settlement.

or unreasonable on the part of the railroad in view of the attitude of his disloyalty which he had manifested; and we cannot hold this finding to be clearly erroneous."

The findings of the District Court have great bearing in Mr. Goode's case in that:

1. The court recognized that by helping a plaintiff press a personal injury claim, Phillips was guilty of gross disloyalty, and that the action was detrimental to the known interest of the company.

2. The court held that the Board was manifestly in error in holding that because no rule of the current agreement was violated discharge was wrongful.

3. The court accepted as a correct view that "there are, of course, certain acts which an Employee might commit for which he could be disciplined even though no specific agreement or company rule had been violated, but those are acts for the commission of which an employee could reasonably expect to be punished." Plaintiff's Brief, Brotherhood of Railway, Etc., A. C. L., 154 F. Supp. 71.

Carrier respectfully submits that the principles raised by this court have definite application in Mr. Goode's case. We further submit that the principles give positive support to carrier's handling of Mr. F. X. Goode.

In summary the carrier reiterates:

1. The procedural rights of employees under the agreement have been faithfully observed.
2. That Mr. Goode was properly apprised of the charge.
3. The charge as made was substantiated at the hearing.
4. Dismissal is justified.

We respectfully request that discipline not be disturbed.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Employees claim that Coach Cleaner Francis X. Goode was unjustly dismissed from the service of this carrier and seek his restoration to his former employment and payment to him for all time lost by reason of his dismissal.

He was charged and hearing conducted on the statement "that you, Francis X. Goode, as an employee are representing employees in personal injury cases against the New York, New Haven and Hartford Railroad Company."

The next paragraph of the charge states a conclusion as to an implied condition in contracts of employment of loyalty of an employe in his employer. (This proposition is supported by the text in 56 Corpus Juris Secundum, Page 430, Master and Servant.)

Continuing, it is said that Mr. Goode "improperly used his employment relationship for the purpose of furthering a course of action clearly inimical to the interest of his employer."

Employees assert that the findings of the carrier are invalid for seven reasons:

- 1—The hearing was held without jurisdiction.
- 2—The decision violates the Railway Labor Act (General Duties, Third).
- 3—The charge is incompetent.
- 4—The charge is not supported by evidence.
- 5—The carrier has no remedy at law.
- 6—The duty allegedly owed by the employe is erroneous.
- 7—There has been no breach of the contract of employment.

Briefly, we hold that (1) the hearing was conducted pursuant to and in conformity with Rules 32, 33 and 34 of the controlling Agreement. (2) The provision of the Railway Labor Act treating of "Representatives" their designation, freedom from restriction or influence of the carrier is, by its terms, restricted to "for the purposes of this Act" and has no application to the representation of an employe as legal counsel for a client who may also be an employe of the carrier. (3) and (6) relate to the sufficiency of the charge which we find adequate to inform Mr. Goode that in his representation as an attorney at law of two fellow employes in their claims against his employer, he acted in a manner inimical to the interest of his employer and in violation of his implied duty of loyalty to his employer. Here is the crux of the charge. (3) Grounds for dismissal may exist though not spelled out in any rule of the agreement, if they are proven and are of such consequence as to disqualify or unfit an employe from observing the terms of his contract of employment. See Awards 6171, 7140, 3rd Division and Federal cases hereinafter discussed. (4) and (7) go to the heart of the proof offered to support the charge.

There is no dispute in the proof. It is the effect of the proof that is controverted.

Mr. Goode accepted employment in his professional capacity as a lawyer by two of his fellow workmen who had claims against the company growing out of personal injuries suffered by them while on duty. Both claims were presented to the carrier and suit instituted on one of them under the Federal Employees Liability Act. Since separation from his employment, Mr. Goode is handling a number of other claims as an attorney against his company.

Are these engagements a violation of Mr. Goode's contract of employment with the carrier?

The position of the carrier is supported by the two decisions which it cites:

Brotherhood of Railway and Steamship Clerks, etc. versus Atlantic Coast Line Railroad Company, 154 F. Supp. 71, U. S. District Court, Eastern District of North Carolina, and same case on appeal, 253 Fed. 2d 753, Fourth Circuit, U. S. Court of Appeals.

In these cases, Phillips, an employe of defendant company, had been discharged after hearing and was ordered reinstated by the National Railroad Adjustment Board because, in its opinion, Phillips had not violated any rule of the collective agreement involved. Phillips had assisted a fellow employe who had a suit pending against their employer by permitting photographs to be taken of a spiral staircase after working hours, which photos were intended to be used in behalf of the fellow employe in his law suit against the carrier.

The District Court reversed the award in favor of Phillips and the Circuit Court of Appeals affirmed.

The basis of the action in both courts was the disloyalty of Phillips toward his employer. The District Court said that Phillips' action was overt and directed against the known interests of his company.

As urged by Mr. Goode, the mere cleaning of cars would not afford him information which would be the basis of a claim or suit against his employer; that he did not solicit the employment.

But his employment afforded access to the property of the carrier to association with its employes and to its method and manner of mechanical operation of its railway.

If by reason of these contacts he could advantage himself by accepting professional employment against his company, he would be subjected to the urge to avail himself of that opportunity. When he took such employment, made possible, at least in part, by his connection with his company, and pressed claims against it, his loyalty was divided. The interest of his clients and his interest were adverse to the carrier. If they succeeded, the company suffered financial loss.

Such diverse relationships were incompatible, adverse and inimical to the employer's interest and cannot be reconciled with the obligation implicit in the contract of employment between Mr. Goode and the carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3253

The majority in their findings state that hearing was conducted pursuant to and in conformity with Rules 32, 33 and 34 of the controlling agreement; however, the defendant testified during the investigation that he was not apprised of the precise charge against him as is required by the provisions of Rule 34.

According to the majority the claimant "acted in a manner inimical to the interest of his employer and in violation of his implied duty of loyalty to his employer" when he represented other employes in personal injury suits against the carrier. This conclusion is unwarranted. The majority ignores the fact that claimant's practice of law is entirely separate and apart from his employment with the carrier as a coach cleaner although the majority admit, and the record discloses, that claimant accepted employment in his PROFESSIONAL CAPACITY AS A LAWYER when he handled the cases of other employes. The bringing of a legal action against the carrier in the claimant's professional capacity as an attorney for other employes is not cause for determining that the claimant is disloyal insofar as his employment relationship to the company is concerned. The employer may not incidentally exact anything of its employes that may, in the words of the Supreme Court, provide a leverage for taking away advantages of the collective contract. Order of Railroad Telegraphers v. Railway Express Agency, 64 Sup. Court Rep. 582.

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner