NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23151
Docket Number MS-23080

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Joel E. Myron
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"1. Was my dismissal for "disloyalty to Con Rail" illegal?

2. Was my dismissal for "disloyalty to Con Rail" retaliatory because I am an active Local Chairman for my Lodge, Lodge 705, BMWE? etc.

3. Was my dismissal for "disloyalty to Con Rail" arbitrary?

4. Was my dismissal for "disloyalty to Con Rail" excessive?

5. Was my dismissal for "disloyalty to Con Rail" violative of the Constitution of the United States?

My position prior to dismissal was track fore&n.

6. Should I be re-instated with fullback pay, seniority, and full benefits?

Please have the Carrier submit all copies of the transcript of my hearing and Investigation.

Please consider my case as a companion case to the case of BMWE v Consolidated Rail Corporation with respect to Mr. Robert J. Jacques, a Grievance man who was dismissed by Con Rail in September, 1978, and who is awaiting decision by the Board. Mr. Jacques' case was LV-75 "on the property" and was forwarded to the Board by the Pennsylvania Federation of the BMWE and has a date of 8/2/79 on the return letter to Mr. Jacques. Many of the issues in my dismissal are intimately involved With the dismissal of my Grievance man, Mr. Jacques."

OPINION OF BOARD: On December 20, 1978, the Carrier charged Mr. Joel E. Myron, the Claimant, with gross disloyalty for representing, as an attorney, certain employes in Court litigation and in personal injury claims where the interests of the employee were adverse to the Carrier. The Claimant entered the service of the former Lehigh Valley Railroad Co. a8 a Trackman and was subsequently promoted to a position of Track Foreman. He was an elected representative of the Union and served as Local Chairman, and also an attorney admitted to practice before the Bar in the State of New Jersey.

A hearing and investigation, as prescribed in the Agreement between the parties, was held on the charges on January 23, 1979, after a postponement requested by Claimant. Copy of the transcript was made a part of the record. Claimant appeared at the heating and investigation accompanied by the District Chairman of his Union. Following the investigation Claimant was notified in writing on February 2, 1979, of his dismissal for the offenses with which he had been charged. The claim was appealed on Claimant's behalf by the Organization to the highest designated officer, and following a conference on the subject, the appeal was denied. Thereafter the claim, framed in a somewhat different style, was presented to this Board for resolution.

The charge6 of disloyalty alleged by the Carrier in its notice to appear for investigation and upon which discipline was assessed are extremely serious in the context Of an employe's relationship with his employer. Referee Anrod in Award 20706, First Division, said It clearly:

> "There is no more elemental cause for discharge of an employe than disloyalty to his employer."

The question confronting this Board is whether there is substantial evidence in the Transcript of the Investigation which support.6 the Carrier's conclusions proving the charges.

The essence of Claimant's argument in the document6 filed with us and in the oral presentation made to the Board, including the citation of various decisions from Public Law Boards viz. Award No. 1, Public Law Board 2184 and Award No. 12, Public Law Board 1974, which we have studiously considered, is that he was actively representing the various individuals as Local Chairman of Lodge No. 705 and, assuch, had the protection guaranteed all employe representatives under the Railway labor Act. The Claimant contends this was particularly true of the case he handled before the New Jersey State Court in behalf of Robert J. Jacques. In reference to the injury claims of individuals represented by the law firm of "Hirsch & Myron" the partnership letterhead, the Claimant asserts he was protected by a "limited partnership agreement" which was consummated on or about November 15, 1978.

There can be no question that the matter handled by Claimant in behalf of Robert J. Jacques before the New Jersey Appellate Division was a Tort action, in fact, It was stated in the complaint filed with the court that plaintiff's (Jacques) cause of action "is separate and apart from the Union and arises under State tort law..."

The Claimant's arguments in his defense that he was handling the Jacques' tort claim before the New Jersey Courts in behalf of Local Lodge No. 705 pursuant to the Railway Labor Act defies logic. The Railway Labor Act does not deal with Tort actions. It deal8 with "Disputes concerning the making of collective agreements and to grievances arising under existing agreements." See Slocum v Delaware, L & W R Co. (339 US. 230) and E J & E v Burley (325 US. 711). Secondly, union representatives are not clothed with any special authority under the Railway Labor Act to choose the legal forum for the progression of non-contract disputes. Except vhen one is representing himself before the Court, the credentials of those who purport to assume the mantle of representation must meet the minimum qualification requirements of the Court Involved. We can only assume Claimant met these qualifications of the Court as a proper representative of Jacques on the grounds that he was admitted to practice law in the State of New Jersey as a private attorney and not because he was clothed with any express or apparent authority under the Railway Labor Act simply because he was a union representative. Indeed, as a union representative, the Claimant does not suggest he would be qualified to practice before the various Court jurisdictions in the State of New Jersey. Thus, it was solely as an attorney admitted to the private practice of law in the State of New Jersey that Claimant had any standing to conduct the court appeal in behalf of Jacques. As such, he was not clothed with any of the immunities which might arguably be associated with a Union Representative in the conduct of Union Business under the auspices of the Railway Labor Act. The evidence is clear that Claimant was a private practitioner handling a Tort claim in the New Jersey Court in behalf of a client whose interests were antagonistic to those of his employer.

Even if it were relevant, this Board is not convinced by the record that Claimant was acting at the behest of the Local Lodge when he was actively pursuing the Jacques' matter before the New Jersey Courts. The record discloses that he was acting variously as agent and attorney in the Jacques' matter as early as October, 1978. The record reveal6 a mysterious atmosphere surrounded the adoption of the resolution by Local Lodge No. 705 purporting to authorize Claimant to pursue the Jacques' claim through the courts as the Secretary of the Lodge exemplified in the investigation by his evasive answers to what appeared to be justifiable questions concerning the authenticity of the resolution. The resolution, irrespectively, was adopted by merely affixing the Lodge's seal without benefit of the Secretary's signature on January 22, 1979. It is apparent the resolution was an after thought and Its passage one day before the scheduled trial, following an earlier postponement requested by Claimant, tends to further taint its credibility. Additionally, the Wording of the resolution makes it clear that Claimant was aware of the jeopardy in which he was placing his employment

with the Carrier by pursuing the court action. It was a clever attempt by Claimant to clothe himself with the immunity of the Railway Labor Act by including language in the resolution that he "... is acting in an extension of his role of local chairman and, as such, is conducting protected activity for the Lodge when he ads as attorney for Mr. Robert Jacques." The Railway Labor Act can not be 'extended by resolution to include immunity for this type of activity.

We take note that Claimant does not contend that his representation of Jacques in Court was protected by the "limited partnership agreement" which on its face extends only to matter6 covered by the Federal Employers Liability Act.

We will turn next to the personal injury claims which Claimant argues were covered by the "limited partnership Agreement", dated November 15, 1978. The Claimant submitted *said* Partnership Agreement along with certain sections of the New Jersey statutes dealing with limited partnership agreements. Section 42:2-9 is captioned8 "Name not to include surname of limited partner; exceptions,

> "1. The surname of a limited partner shall not appear in the partnership name, unless,
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> a. It is also the surname of a general partner, or
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> b. Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.
>
> "2. A limited partner whose name appears in a partnership name contrary to the provisions of paragraph "1" of this section is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he isnot a general partner."

The record further shows that Carrier received correspondence from the Claimant's law firm shown as "Hirsch & Myron", which according to the statutes cited by Claimant was a positive indication that it was a General partnership rather than a limited partnership.

Our decision, however, is not controlled solely by this point. During the course of the investigation, the Claimant was asked how the public wasmade aware that hisfirm wasa limited partnership. The line ofquestioning follows:

> "Q. Is the public aware that your firm is a limited partnership?
>
> "A. I think Mr. Hirsch might be able to answer that better than I. I am not certain because I work on the railroad forty (40) hours par week and there are people that know it is a limited partnership.
>
> "Q. Mr. Myron, what are you holding yourself out to the public as, a partnership with Mr. Hirsch or a limited partnership?
>
> "A. Asa limited partnership, I accept those cases that I am permitted to under the scope of the limited partnership agreement.
>
> "Q. How is the public made aware of this?
>
> "A. I don't usually deal that much with the public because during the work week when the office is open, anyone who might be calling in will get Mr. Hirsch or the Secretary. If people ask me about representation in cases that arc not within the scope of the partnership agreement, I will tell them to contact Mr. Hirsch or, at times, other attorneys also."

We note the Claimant never furnished a definitive answer to the question, yet, he more than anyone else, should have been able to submit positive proof that the "Limited Partnership Agreement" was not Just a ruse or smoke screen to avoid the type of charges subsequently brought against him. If, as Claimant asserts, he was holding himself out to the public as a limited partnership, he should have been able to prove it. On the other hand, the letters addressed to Carrier's "Claim Department" under the Letterhead - "Hirsch & Myron - Attorneys at Law" contained the information "that our firm is representing Mr. _____ . . .", which clearly suggests that Claimant was representing the referred to employes in a personal injury matter.

The question of where an "employe/attorney's" loyalty lies was most aptly put by Judge Thomas Maybry acting as the Neutral Member of System Board of Adjustment No. 18 in Decision No. 3310 denying a dismissal of a Claimant who was also an attorney, and who had participated in a law suit in which he represented an employe against the Southern Pacific Company. Claimant had been dismissed by the Company contending that such action on the part of Claimant constituted disloyalty to the Company. Judge Maybry thereinheld:

> "We can think of no more willful violation of Operating Rule 803 then this. This is certainly to be classified as willful disregard of the company's interest and therefore as an act of disloyalty to the company. The law suit presented a situation in which the client was clearly antagonistic, and hostile; to that of the company. The litigation quite appropriately demanded claimant's full and complete dedication (under his oath as an attorney-at-law and the code of ethics of the profession) to the interest of the client, as against all other conflicting, or opposing interests.
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> This loyalty so required of claimant in his professional capacity could not be shared with the defending company, or sparingly observed. It had to be an all out effort on the part of claimant, restricted only by the requirements of professional ethics. The profession of law is a jealous mistress. It will accept of no divided loyalty. It permits no philandering. An attorney's attachment must be complete and non-seducible. Claimant must, because of the vary nature of his employment as an attorney, put entirely aside consideration of all opposing Interests which might conflict with those of his client. . ."

It is clear to this Board that Claimant's loyalty was, as dictated by his oath as an attorney and under the code of ethics of his legal profession, with his client, Jacques, as opposed to the defendant in the Court case, his employer, the Carrier.

Hearing was held by the Board on October 14, 1980, with this referee present and Claimant as well as his legal counsel were given full opportunity to present his case.

Considered in totality, the evidence submitted at the investigation established that Claimant was acting as an attorney in behalf of an employe in a matter not covered by the Railway Labor Act., representing an Interest adverse to the Carrier; that he also represented other employes whose interests were adverse to the Carrier in personal injury claims, and his actions, as to the Carrier and the public at large, were not protected under the statutory provisions cited by Claimant; consequently, there is no basis for this Board to disturb the discipline assessed in this case. We must deny the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: C. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1981.