Award No. 12320
Docket No. CL-14077

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

RAILROAD DIVISION, TRANSPORT WORKERS UNION OF AMERICA, A.F.L.-C.I.O.

UNION DEPOT COMPANY, COLUMBUS, OHIO

STATEMENT OF CLAIM: This claim is filed on behalf of S. L. Wiley, formerly Chief Mail Sorter employed by the Carrier, with which TWU has a collective bargaining agreement.

Following a trial that was neither fair nor impartial, Wiley was dismissed arbitrarily and in bad faith for having "engaged in disloyal conduct," in that, as Vice President of Local 2005, TWU, and certified Grievance Chairman for the Carrier's employes represented by the Local, he referred a fellow-employe, fellow-Union member and long-time acquaintance, who had sustained serious personal injuries on the job, to Union counsel, so that he would be adequately represented in connection with his claim under the Federal Employes' Liability Act (hereinafter "FELA").

Since Wiley was on sick leave at the time of his dismissal and is now on a disability annuity, there is no monetary claim. However, two questions of first and far-reaching significance to railroad employes and their representatives are presented. They concern (1) the requirements of a fair and impartial disciplinary trial, and (2) the right of a union to refer union members having FELA claims to union counsel.

This claim is for Wiley to be exonerated of the charge of disloyalty and reinstated as a disability employe, so that he may enjoy any and all retirement benefits.

OPINION OF BOARD: On January 11, 1961, at approximately 5:45 P. M., Mail Sorter Valentine sustained serious injuries while on duty and was taken to Grant Hospital in Columbus, Ohio. On the next day, January 12, 1961, Valentine underwent operation for his injuries between 4:20 and 6:45 P. M.

At about 11:00 A. M. on January 13, 1961, the morning after the operation, Claimant on his own initiative visited the injured employe at the hospital, accompanied by Attorney R. E. Potts, Counsel for the local Union. After Valentine described his injuries to Potts, and the circumstances under which he had sustained them, the lawyer had Valentine sign a form requesting consultation with Union counsel and also a retainer contract.

Subsequent requests by Mr. and Mrs. Valentine for a return of the documents were met with refusal by Attorney Potts.

Two doctors who had participated in the operation testified at the Carrier's trial of the Claimant that they doubted that Valentine was in a medical condition to sign any papers, inasmuch as, in their judgment he was in a state of "hangover" from the effects of prolonged anesthesia administered in connection with the operation and of morphine administered early that morning to control his pain.

Acting on the foregoing facts, the Carrier served the Claimant with the subject charge and arranged for a trial on these accusations and on January 5, 1962, found him guilty of the charge and dismissed him. (The record also shows that as the result of this incident and of other actions regarded as contrary to the Canons of Professional Ethics, Attorney Potts was suspended from the practice of law in the State of Ohio by the Columbus Bar Association. This was confirmed by the Supreme Court of Ohio on June 26, 1963.)

The record of the hearing does not support the claim of the employe that he was not afforded the "fair and impartial hearing" stipulated in Rule 44, Item 4 of the Agreement. Although there were procedural deviations from formal court conventions, these were not fatal to the process and a "fair and impartial hearing" was attained within the meaning and intent of the Agreement proviso.

The determinative question before this Board is whether or not the Claimant was guilty of disloyalty within the meaning of Rule 21 in the part he played in calling upon the injured employe with the Organization's local counsel at which time the lawyer secured the injured employe's signature to a contingent-fee retainer contract.

The evaluation of the Claimant's actions must be made with consciousness of this employe's separate yet simultaneous identity as the Grievance Chairman of his local Organization. As such, there is properly included within his assigned functional orbit, interest, concern and possible activity on behalf of, the legal rights of a fellow member who is injured on the job. Such activities are necessarily adversary in nature and oppositional to the Carrier in the latter's role as a party from whom compensation is being sought.

The Agreement meaning of "disloyalty" cannot be invoked to impose discipline against the prosecution and support of such claims, unless the employe's representative involved is at the same time guilty of actions which in kind and degree go beyond his official responsibilities to the point at which they are a desertion of his responsibilities and obligations as an employe. The test in such a situation cannot be the single one of seeking ends opposite to those of the employer. Such opposition is unavoidably present at many points of the legitimate collective bargaining confrontation between management and union official.

In Award 11911, we found the Claimant to have improperly elicited and secured internal Carrier financial information which he used in his official Organization capacity. The Board stated:

> "Claimant in his dual status could not avoid the consequences of his knowledge of the rules as an employe and his inducement of a breach thereof merely by invoking his alter ego as an employe representative."

There was no such abuse of office here.

On the other hand, in Award 5367 the Board protected the Claimant from having his activity in the role of a union representative used as judgment against him as an employe, even though his conduct may have been "seriously objectionable" at an investigation of charges against a fellow employe whom he was representing.

In the matter before us, the Claimant's actions as a representative did not in character and degree overflow the boundaries of his official position so as to contaminate his on-the-job obligations for loyalty within the terms of this employe-employer relationship as governed by the Agreement, by the Carrier's rules and by the conventional expectations of employe work-response to employer.

The act of "referring Union members having FELA claims to Union counsel", the right which the employe's Organization defends, was here accompanied by insensitiveness to some basic ethical considerations which exist in these matters. There was no evidence, however, that the actions were motivated by more than a distorted notion of the zeal of office, or that given the Claimant's position, they demonstrated "disloyalty" within the Agreement meaning or intent of that term.

It was not shown that the Claimant was guilty of a recurring or continuing pattern of soliciting business for a lawyer or lawyers. The attorney involved was the regular local Organization's Counsel. The unethical actions (from the viewpoints of legal canons, the litigation process and community responsibility) were, except for the one act of bringing the attorney to the bedside of Valentine, not shown to be the work of Wiley, but were attributed in the testimony to the attorney. There was no evidence that a monetary consideration for the Claimant was involved in the arrangements. (The fact that the same attorney handled a probate matter for Claimant without fee, two and a half years earlier, does not constitute evidence that Wiley acted here as a paid intermediary.) There was also no evidence that Wiley in any way maligned or descredited the Carrier.

The most disturbing aspect of Wiley's intervention which has been raised is that relating to whether Valentine was in a mental state to understand the committment he was asked for and gave. The evidence does not, however, show that the Claimant knew of in advance or could detect at the bedside such a deficiency (if such a deficiency in fact existed) of Valentine's mental powers.

The instant claim must be differentiated from that which was the subject of Award No. 3253 cited by the Carrier, because the Claimant there clearly violated his obligations as an employe by permitting photographs to be taken on Carrier property after working hours, the photographs being intended for use in a law suit against the Carrier.

Award 1884 in the Second Division in which the Board found the Claimant to be acting disloyally also differs from the instant matter in character and degree. The facts given there show that the Claimant was systematically active as a "runner" soliciting business for a claims lawyer, for which he was paid. He carried on these activities both while an Organization official and not an Organization official. The very dimensions of those activities distinguish that matter sharply from the present one. The Claimant's activities in the earlier matter were shown to have been agressively relentless, continuous and mercenary and aside from any official obligations. As a result, they affected and

infected the Claimant's identity as an employe to the extent of conflicting with reasonable considerations of loyalty. Such a case was not claimed or proven here.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March 1964.

DISSENT TO AWARD NO. 12320, DOCKET NO. CL-14077

Award 12320 is in palpable error in condoning Claimant's direct participation in an act of "ambulance chasing" on the premise that "the Claimant's actions as a representative did not in character and degree overflow the boundaries of his official position" with the Organization. Petitioner itself admitted that Claimant had deviated from the Organization's policy in this case and that he had used bad judgment and was indiscreet. In addition, Petitioner admitted that Claimant had not "performed any duties as Union representative since September, 1960 because of personal illness"; he was in this status when he went to the hospital and offered Valentine legal counsel on January 13, 1961.

Award 12320 recognizes that Claimant acted in concert with the Organization's local counsel in securing "the injured employe's signature to a contingent-fee contract". For counsel's action in this and other such cases, the majority admits that he "was suspended from the practice of law in the State of Ohio by the Columbus Bar Association" and that "This was confirmed by the Supreme Court of Ohio on June 26, 1963." The court condemned the Attorney for accepting employment with the Organization and then assenting to such soliciting and/or either aiding directly or indirectly therein. Accordingly, Award 12320 is in palpable error in absolving the Claimant herein of his guilt of disloyal conduct in aiding directly in soliciting a claim from the injured employe against the Carrier in the instant case.

For the foregoing reasons we dissent.

W. H. Castle
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White