PUBLIC LAW BOARD NO. 1207

REVISED AWARD NO. 8

UNITED TRANSPORTATION UNION

VS

BURLINGTON NORTHERN, INC.

STATEMENT OF CLAIM: Request of former Chicago Yardman E. J. Riddle for reinstatement to service, with seniority unimpaired and pay for all time lost until reinstated to service with the Burlington Northern.

PREFACTORY STATEMENT: This award replaces that rendered by this Board on December 3, 1973, the instant matter having been remanded to this Board by order of the United States District Court of Minnesota, Fourth Division, which order was declared by the United States Court of Appeals for the Eighth Circuit to be not subject to appeal.

Our original decision was worded as follows:

"Mr. Riddle was discharged because he was engaged in employment as an investigator for a law firm specializing in damage suits against railroad companies. In such capacity he helped prepare the cases of two fellow employees, marking off duty for such purpose.

"The conflict of interest is readily apparent, and we find it irreconcilable.

"Claim denied."

Subsequent to our rendition of such award, Claimant Riddle filed suit in the aforementioned trial court to vacate such award. In his opinion, U. S. District Judge Miles W. Lord acknowledged that the range of judicial review of Public Law Board Awards is "among the narrowest known to the law" but found basis for review because of the "failure of the Board . . . to confine itself to matters within its jurisdiction", citing 45 U. S. C. Sec. 153 First (q).

The Court held,

> "Accordingly, this court finds that the decision of Public Law Board No. 1207 in Award No. 8 denying a claim for reinstatement on the grounds of an irreconcilable conflict of interest due to employment as an investigator for a law firm specializing in damage suits against railroad companies is without foundation in reason or fact and cannot be a logical means to further the aims of the collective bargaining agreement. Therefore, the award given is beyond the jurisdiction of the arbitrator and must be set aside."

We apprehend that the Court meant that the award is beyond the jurisdiction of the *Board* since the award was unanimous and since a neutral member is only one of three co-equals on a Public Law Board.

Carrier appealed Judge Lord's order, but the Court of Appeals held that the order was not a final order subject to appeal and therefore dismissed the appeal for lack of jurisdiction.

We reconsider the case pursuant to the U. S. District Court order.

RULES ALLEGEDLY VIOLATED: Carrier's letter of dismissal addressed to Claimant and dated September 20, 1972 cites as the basis for discipline Rules 700, 700 (A) and 702 (C) Consolidated Code of Operating Rules, which follow:

RULE 700

"Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subject to criticism and loss of good will, or who do not meet their personal obligations."

RULE 700 (A)

"Employees who withhold information, or fail to give factual report of any irregularity, accident or violation of rules, will not be retained in the service."

RULE 702 (C)

"Employees must not engage in other business or occupation unless they have applied for and received written permission from the proper authority."

FINDINGS: Both the Organization and Carrier call attention to the alleged procedural errors. Carrier maintains that in

the appeal process the claim for lost earnings was abandoned, rendering this claim one for leniency over which the Board has no jurisdiction. The Organization contends that Carrier failed to schedule the formal investigation within five days of its knowledge of the circumstances resulting in discipline. We find neither assignment of error to be valid and conclude that the matter is properly before us for all purposes.

We examine each of the rules which Claimant is asserted to have violated, the violation of such rules being the only valid basis for his discharge.

Rules 700 authorizes Carrier to discharge employees who are ". . . disloyal, . . . (or) . . . dishonest . . . ."

We interpret the U. S. District Court holding to mean that this Board exceeded its jurisdiction because of the fact that our original award detailed no specific violation of the Agreement by Claimant as a basis for discipline, such award simply justifying the discharge of Claimant because of "an irreconcilable conflict of interest".

One of the reasons for the narrow scope of judicial review of the decisions of public law boards is that we operate in an esoteric field. Our original award was very brief, unlike many judicial opinions. But neither in its brevity nor in its failure to render a point by point dis-

cussion of issues was it unlike the thousands of other similar decisions that go unchallenged in the judicial system.

We found "an irreconcilable conflict of interest". The transcript of the investigation was before us as were the rules which Claimant Riddle was found by Carrier to have violated. Our finding, to the initiated, simply meant that Claimant's disloyalty, a violation of Rule 700, was so palpable as to make further comment unnecessary. The distinguished employee member of this board obviously understood, for the decision was unanimous.

We herenow reaffirm our holding that an irreconcilable conflict of interest resulted from Mr. Riddle's acceptance of "employment as an investigator for a law firm specializing in damage suits against railroad companies". We respectfully disagree with Judge Lord's contrary finding and apprehend that restatement of our holding is essential to preservation of the principle as a point for higher appellate courts to consider in the event of further appeal.

We do not believe that when an employee accepts remuneration from a perennial adversary of his employer such employer should have to prove actual harm before discharging the employee for disloyalty. The law firm using Mr. Riddle's investigative product is a constant adversary of Burlington Northern. It is as if an officer of Macy's

accepts covert employment with Gimbel's. (Mr. Riddle's association was covert for many months and never voluntarily revealed by him to carrier.)

In persevering in the principle of our original holding we do not endeavor to break new ground; we simply restate the uniform holding of all known prior awards on the subject.

Decision No. 3310 of Special Adjustment Board No. 18 was authored by the distinguished referee, Thomas J. Mabry, a former Arizona Supreme Court Justice as well as Governor of that State. The case involved a fireman on the Southern Pacific who was also a licensed attorney. Fireman (Lawyer) Waag undertook to participate in an F. E. L. A. case on behalf of a fellow employee doing the investigative work and assisting the attorney who tried the case. There was no showing that he engaged in any shady tactics. Yet solely on the basis of such undertaking he was found to have violated the following rule:

> "Any act of hostility or willful disregard of the Company's interest will not be condoned."
>
> Judge Mabry wrote,
> "We can think of no more willful violation of ... (the rule). This is certainly to be classified as 'willful disregard of the Company's interest,' and therefore an act of disloyalty to the company."

Award No. 3253 of the Second Division, NRAB, upheld discharge of a car cleaner who was also a licensed attorney

and who brought F. E. L. A. actions on behalf of two employees.

Decision No. 3194 of SBA 18 and Second Division Award No. 1884 upheld in each instance discharge of an employee who solicited business for attorneys specializing in F. E. L. A. cases.

A most interesting case is reported as Brotherhood of Railway Clerks v. Atlantic Coast Line Railway Co., 154 F. Supp. 71 (D.C., E.D.N.C., 1957), aff. 253 F 2d 753 (4th Cir., 1958). The discharged employee was a clerk who, after hours and in the company of various outsiders, entered the office building where he worked. The incursion was for the purpose of taking photographs and developing evidence in a suit pending against the employer. It was admitted that the clerk violated no rule of the agreement. For the latter reason the Third Division, in Award No. 6116, ordered him reinstated. But the Federal Courts upheld the carrier's refusal to comply with the Award, citing the grievant's "gross disloyalty".

"No man can serve two masters." No man can loyally serve both Burlington Northern and the law firm which employed Claimant and for whom he worked on many days when he should have been protecting the service of his first employer.

Yet while our original award might appear to be based

upon a finding of conflict of interest in dual employment alone, nevertheless our denial award was actually based upon an abundance of evidence which convicted Mr. Riddle of violation of the cited rules. In Decision 3310 of SBA 18 Judge Mabry apologized for the length of his (5 page) opinion. The neutral now deems it appropriate to apologize for the brevity of our original opinion. Let us summarize the record before this Board.

The record reflects that over a period of 32 months, January 1970 through August 1972, when the normal railroad employee would be zealously seeking 22 starts a month at least, Mr. Riddle averaged slightly over 11. Much of the time while he was refusing service of his primary employer he was engaged in the disputed work. But his fringe benefits, paid by Carrier, were as though he were working full time.

We find that Mr. Riddle's excessive absence from duty reflected a disloyalty squarely within the purview of Rule 700 and that such violation of such rule was of sufficient gravity to support discharge.

At all times while he was engaging in his dual employment Mr. Riddle earned more working for the law firm's investigative service than he did working for Carrier. In making his investigative work his principal employment Mr. Riddle displayed disloyalty to the extent that such consti-

tuted violation of Rule 700. Such violation of the Consolidated Code of Operating Rules was of sufficient gravity to support the penalty assessed by Carrier.

We further find from the record that Claimant violated Rule 700 in that he was not only disloyal but *dishonest in doing investigative work while under pay and on duty* in Carrier's service. Such disloyalty and dishonesty justify the discipline assessed by Carrier.

The record reflects further that Claimant engaged in barratry to the detriment of Carrier and in violation of Rule 700 and engaged in dishonesty in violation of such rule in framing the statements of numerous of his "clients".

Rule 700 (A) requires an employee to make known to Carrier all information relating to any irregularity, accident or violation of rules.

Claimant consistently violated such provisions in withholding information and failing to give factual reports of irregularity and claimed accidents. Such violation was persistent and detrimental to his employer to such an extent as to constitute gross disloyalty to Carrier within the proscription of Rule 700. Such transgressions alone would support discharge.

Additionally, the record is indisputed that Earl J. Riddle violated Rule 702 (C) in failing to apply for and receive written permission for pursuing another business or

occupation. We find that Rule 702 (C) (as well as Rule 700 and Rule 700 (A)) is a reasonable rule which must be enforced and that because of his flagrant violation of such rule Claimant was deserving of the discipline assessed.

We deem it appropriate to comment on Mr. Riddle's lawyers' arguments before the Federal Courts to the effect that Carrier's discipline of Riddle, and this Board's sustention of such discharge, constitute an unfair circumscription of the right of Claimant, a vice local chairman, to aid his brothers. The facts in the record wholly fail to support such position. In pursuing the activity which resulted in his discharge Mr. Riddle was not ministering to his union charges. Instead, he was ranging far away from his local, soliciting business from strangers on behalf of his lawyer employers, at the same time neglecting his duty to Carrier. Such argument by counsel constituted a demagogic cheap shot at the General Chairman who ably and diligently presented Mr. Riddle's grievance to this Board.

Just cause existed for Mr. Riddle's discharge. His violation of the three rules was clearly shown.

AWARD: Claim denied.

David H. Brown
DAVID H. BROWN, Chairman and
Neutral Member

T. C. DeBUTTS, Carrier Member

G. C. McCOY, Organization Member

April 1, 1977