PUBLIC LAW BOARD NO. 1974

Award No. 12

Docket No. NFEC-1223

Parties to Dispute: United Transportation Union - E and Consolidated Rail Corporation

Statement of Claim: Appeal dismissal of Fireman (Helper) J. F. Collins date of July 28, 1978, as a result of an investigation held July 21, 1978, with reinstatement with full seniority rights, vacation privileges remain unimpaired and payment be made of all monies lost as a result thereof.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated May 9, 1977, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Fireman was regularly assigned to a Hostler Job in Carrier's Frontier Yard, Buffalo, New York. Upon completion of his tour of duty on June 5, 1978, Claimant marked off. Claimant is also the United Transportation Union (E) Local Chairman and is a practicing Attorney-at-Law.

Claimant, on June 9, 1978, was sent a notice to attend an investigation on June 14, 1978, charged as follows:

> "Disloyalty to the Consolidated Rail Corporation in representing as an Attorney a person having interests adverse to those of the Consolidated Rail Corporation - in particular, the case of John De Freitas, Civil Action File No. CIVIC-78-278, vs. Consolidated Rail Corporation dated May 26, 1978, and received by Consolidated Rail Corporation at 1:45 PM on June 6, 1978."

The investigation commenced on June 14, 1978 but neither Claimant nor his representative was present. However, during the proceedings thereof, Claimant's Local Chairman contacted Carrier and requested that

said investigation be recessed and reconvened at a later date which was done.

Claimant was subsequently notified to attend the reconvened investigation scheduled for July 21, 1978, by letter reading:

> "Arrange to be present at a formal investigation to be held in Room 126, Penn Central Terminal, July 21, 1978 at 10:00 AM. This investigation was originally scheduled for June 14, 1978, and recessed due to the fact that you were out of town and unable to attend."

As a result of such investigation Claimant was notified, July 28, 1978, in effect, that he was guilty as charged, to wit - he was disloyal because he had represented as an attorney an employee suing the Corporation. Claimant was dismissed in all capacities as discipline therefore.

The instant case apparently arose because of the several hats worn by Claimant, to wit - that of an employee, that of a Local Chairman representing engine service employees and as an attorney admitted to the bar and licensed to practice law in the State of New York.

It is clear that the activities carried out by an employee while acting in the performance of his duties as a union representative, which activities properly fall within the duties of such union representative, are protected activities. Therefore, generally speaking, in such circumstance such an activity is something that an employee cannot be disciplined for because they are not matters which normally would provide a proper basis for a charge of disloyalty.

The law, generally speaking, does not protect the activities of an employee, who, as such, asserts or takes a course of action which is inimical to that of his employer. Such an adverse act could provide a basis for an employer to bring a charge of disloyalty against such an employee.

It is likewise clear that when an employee-attorney takes the case of another employee and on behalf of such employee sues his employer, he thereby, as an advocate, asserts an interest inimical to that of his

employer and creates a basis for a charge of disloyalty.

The Supreme Court in UTU vs Virginia, 377 U.S. 1, defined, if not confined, the role of an employee to giving advice, when in pertinent part, it held:

> "The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally were or through a special department of the Brotherhood to advise concerning the need for legal assistance--and, most importantly, what lawyer a member could confidentially rely on--is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

The factual circumstances of each case would, of course, govern each case. Generally speaking such right of counsel would not permit an employee to solicit the personal injury suits against a Carrier from among Carrier's employees. See, for instance, Second Division Award 1884. There, the Board held that the Claimant had improperly used his employment relationship with the Carrier to further a course of action clearly inimicable to his employers interests. Therefore, as a result Carrier was under no obligation to retain such an employee in its service.

The legal principle involved in such a course of action is set forth in Master and Servant, 56 Corpus Juris Secundum, page 430,

> "One who asserts an interest or performs acts adverse or disloyal to his employer commits a breach of an implied condition of a contract of employment which may warrant discharge."

The line between an employee and that of a representative can be confusing as pointed out by Third Division Award 5787. Therein, the Board in restoring Claimant, who was the BRC (Clerks) District Chairman, held:

> "It is apparent that Joseph's difficulties arose out of a situation wherein he was acting in dual capacity...In his conception of his duty to Gibson as his representative, Joseph breached his duty to the Carrier as its employee...No person should act in a dual capacity..."

Award 5787 further held that either the Carrier or the Claimant should have resolved this anomalous situation.

Similarly, in Award 6116, a BRC District Chairman, employed as a clerk

in Carrier's general office, accompanied outsiders into the office after hours, where certain pictures of a staircase were taken with the thought of their use in a personal injury suit against the Carrier. Said Chairman was dismissed. Claimant was not charged with any specific rule violation. Despite the claim being sustained, when an action was brought to enforce said Award in the U. S. District Court, Eastern District of North Carolina, Raleigh Division, No. 876, July 29, 1957, 154 F Supp. 71, that Court refused to enforce the Award, holding, in part, "The Award ignores the 'Cardinal Rule of Conduct.' The Claimant was charged with improper conduct detrimental to the interests of his employer." The U. S. Court of Appeals, No. 7541 decided March 3, 1958, 253 F 2nd 753, affirmed the holding of the District Court and in part held:

> "...The Board was manifestly in error in holding that the discharge was wrongful merely because no rule of the current bargaining Agreement had been violated. Philips was accorded the hearing required by that Agreement; and we agree with the District Judge that the nature of the charge against him were thoroughly understood at the time of the hearing. The Judge found that his discharge was not arbitrary 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."

Judge Thomas Maybry was the Neutral Member of System Board of Adjustment No. 18 which denied a similar claim in Decision No. 3310 involving the dismissal of a Claimant Locomotive Fireman who was also an attorney, and who had participated in a law suit in which he represented an employee against the Southern Pacific Company. Said Claimant was dismissed by the Company who had contended that such action on the part of Claimant constituted disloyalty to the Company.

There, Claimant had gathered evidence on behalf of the plaintiff and assisted another attorney actively in the prosecution of the personal injury suit. Incidently, the verdict was in favor of the Carrier and against the Plaintiff in the law suit. Judge Mayby therein held:

> "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.

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 attorny's attachment must be complete and non-seducible. Claimant must, because of the very nature of his employment as an attorney, put entirely aside consideration of all opposing interests which might conflict with those of his client. . . ."

Judge Maybry referred to Third Division Award 6166 and Second Division Award 3253 in support of his findings. Said Award 3253 (Hornbeck) involved a Coach Cleaner employed by the former New York, New Haven and Hartford Railroad Company and who also was an attorney. He was dismissed, after a hearing on a charge that he "improperly used or was using his employment relationship for the purpose of furthering a course of action clearly inimicable of the interests of his employers." Award 3253 denied Claimant's request for reinstatement finding in part:

"Mr. Good accepted employment in his professional capacity as a lawyer to his fellow workmen who made claims against the company growing out of personal injury suffered by them while on duty. Both claims were presented to the Carrier and suits instituted on one of them under the Federal Employers Liability Act...

. . . .

But his employment afforded access to the property of the Carrier to association with its employees and to its methods 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 pursued claimants against, it, his loyalty was divided. The interests of his clients and his interests were adverse to the carrier. If they succeeded, the company suffered financial loss.

> Such diverse relationships were incompatible, adverse and inimicable to the employer's interest and cannot be reconciled with the obligation implicit in the contract of employment between Mr. Good and the Carrier."

We note that the charge in this case is identical to and apparently predicated upon the charge found in Award No. 337 of Public Law Board No. 550 (Yagoda) on the former Penn Central Railroad. There, Claimant was a passenger conductor who was also a lawyer admitted to practice in New York and New Jersey and was employed as an attorney in a New Jersey law firm.

Another employee, as a result of a personal injury, instituted civil action against the Carrier. In the course of that suit a Pre-Trial Order was issued by the Judge having jurisdiction. The document was counter-signed by the various attorneys involved and shows for the Plaintiff, the signature of the Claimant made on behalf of the law firm.

There, Carrier's position was that Claimant, by acting in a lawyers capacity on behalf of a litigant against the railroad company, had put himself, for pay, in the service of an activity inimicable to the employers and in direct conflict with his obligations of loyalty to Carrier.

The Board agreed therewith and held that:

> "Claimant's action in professional service of a fellow employee as a litigant against Carrier is not erased by Claimant's testimony that Mr. McIntyre was not his 'personal client' or that the complaint was not drawn by him nor that he would not try the issue at fact in later action..."

In the instant case, Carrier asserts that Claimant testified that he was a practicing member of the law firm of Collins, Collins and DiNata and that it was said law firm which was representing Mr. De Freitas, the Plaintiff in the law suit against Consolidated Rail Corporation.

Carrier further submits that whether Claimant signed the complaint or not, such fact would not absolve him of his involvement in the lawsuit in view of his membership in the law firm.

Carrier also argued that the question of which particular attorney in the firm of Collins, Collins and DiNata may have been retained by the Plaintiff in the litigation is actually immaterial as to the determination of Claimant's guilt in the instant case. In support of such contention, they quote from Corpus Juris Secundum, page 839, Attorney and Client:

> "A valid contract of partnership may be made between two or more duly qualified attorneys, but not between an attorney and a person not admitted to practice. A firm of law practitioners, as such, are regarded as a single entity and the general principles of the law of partnership applies to lawyers with the same force that they did to partnerships engaged in other occupations and professions.
>
> In the absence of a special agreement, each member of the firm asummes the duty as given to its business all of its time, skill and ability, as far as reasonably necessary to the success of the common enterprise, and consequently, in the absence of an express agreement to the contrary, any professional services rendered by a member of a firm of lawyers will be presumed to be for the benefit of the firm.... Fees earned by one member under a firm contract belongs to the firm, and an Award of counsel fees must be considered as being made to the firm." (Underscoring supplied.)

Carrier cited several law cases in support of that same position and, in particular, Eggleton v. Boardman, 37 Mich. 14, wherein it was held:

> "A client is entitled to the personal service of his attorney upon the argument. But the retainer of one member of the firm is a retainer of all, and unless otherwise stipulated, the cause may be argued and conducted by any of them." (Underscoring supplied.)

The Board finds that Claimant was accorded the due process to which entitled by agreement. He was given a timely notice. Carrier's primary burden, aside from the adequacy thereof, in that connection is to prove only that the Notice of Investigation had been sent to the person charged and not that it had been received by him. The use of certified mail is but a means of such proof. We are satisfied that the notice had been sent. The second letter to Claimant, as to the reconvened investigation, was sent to the same address as was the first Notice of Investigation. However, it was received at the same address. Said second letter represented a reaffirmation of the agreed upon continuance of the June 14, 1978 investigation. No rule has been show that in such circumstances, the Claimant is entitled to a particularized second Notice of Investigation.

We therefore find that Claimant has been given proper notice.

Claimant was more than adequantely, if not overly, represented. He had the benefit of two practicing attorneys, including himself, as well as the service of his Local Chairman.

The official transcript, i.e., that taken by Carrier, provides the basis of this appeal.

We find that Claimant does not, as alleged, have the right of access to copy of all correspondence and communications had between Carrrier officials concerning the incident being investigated. Nothing in any rule to so provide was shown to the Board. The investigation conducted was held in a private, industrial employer-employee setting and not in a court of law.

Claimant had every opportunity to present evidence favorable to himself. He was accorded the right to have and present witnesses, which right he exercised. In fact, Claimant participate in the examination and cross-examination of witnesses, as well as in the appellate proceeding of his case.

The Claimant offered Award No. 1 of Public Law Board 2184 (Edwards) in support of his case. We find the facts of such Award are opposite to that herein. There, the Claimant was a brakemen, an attorney-at-law, Vice General Chairman of the UTU-General Committee and legal counsel to the General Committee. There, Claimant had merely advised the Carrier's Claim Agent, by letter, that he was the representative of an injured brakeman"re: personal injuries and lost wages and to address any further questions in connection therewith to him." There was no litigation involved only the notice. That Board held, in part:

> "The Board is not convinced that the Carrier sustained its burden of proof that Mr. Finnerty represented Mr. Scott in a legal action against the Carrier."

We can agree with the findings of said Award for, unlike here, Carrier had moved prematurely as no law suit had been instituted to place Claimant Finnerty in the conflicting role of employee-adversary.

The Employee Representative, at our hearing of this case, skillfully and artfully pointed out that Carrier's arguments possibly might be supportive of a charge other than that actually placed against Claimant. He argued that the Board should view all the evidence in light of Carrier's alleged narrow charge. Award No.19235 of the First Division was offered in support of such contention.

We find some merit in that contention. Carrier, as the moving party, has complete control over the charge it desires to place against an employee. Here, Carrier chose to place a charge, to wit = "Disloyalty ...in representing as an attorney...in particular, the case of John DeFreitas..."

Undoubtedly, Carrier followed the charge which had been placed against the Claimant-Conductor-Attorney found in Award No. 337 of Public Law Board No. 550, wherein Carrier's position was sustained. However, the factual circumstances there differ somewhat from those herein.

The instant record, particularly Exhibits B, H, I and J, as well as the testimony of John T. Collins, Esq., and that of his secretary, clearly and adequately support the conclusion that John T.Collins, Esq. was the attorney selected by Plaintiff De Freitas and that he and not the Claimant was the attorney of record. Claimant apparently did not actively participate in the case. Although it is to be noted that as a partner in the law firm, he nonetheless stood to benefit therefrom. Hence, he is not without blame.

Said Award 19235 (Sembower) held:

> "....It is axiomatic in all criminal proceedings that the defendant must be found guilty exactly as charged. Criminality is not involved in such an instance as this, of course, yet there are such significant analogies between the infliction of the so-called "supreme penalty" in employer-employe relations of discharge that such proceedings may be deemed to have much in common. Consequently, the Division always has been concerned that the verdicts against employes be pursuant to proper notice and charge and in full accord with the accredited standards of due process...."

There, the Board, because of the vagueness of the charge and the

inconsistency of the testimony therein, caused Claimant to be reinstated but without back pay.

In the instant case, Claimant was in fact disloyal. However, it was not because he was the attorney of record, or had directly participated in the litigation. Rather it was because he was a partner and member in a law firm which on behalf of an employee, was sueing Claimant's employer Consolidated Rail Corporation. The distinction in the nature of Claimant's disloyalty is almost without difference. However, when the penalty assessed therefor is separation from service we must be ever vigilant to protect the relevancy or linkage between the charge, the evidence and the conclusion.

Consequently, as in First Division Award 19235, we will reinstate Claimant with all rights unimpaired but without pay, subject of course to his passing the usual return to service examination.

Award: Claim disposed of as per findings.

Order: Carrier is directed to make this Award effective within thirty (30) days of issuance shown below.

G. H. Bunde, Employee Member

N. M. Berner, Carrier Member

Dissenting

Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, February 23, 1980.