

PUBLIC LAW BOARD NO. 1134

PARTIES TO DISPUTE: United Transportation Union

vs

Norfolk and Western Railway Company

STATEMENT OF CLAIM: Appeal of Brakeman T. E. Finnerty for reinstatement with full seniority unimpaired, removal of discipline from the record, full pay for all time lost, recovery for the loss of all fringe benefits (current and future), including the monetary value thereof in the case of benefits deemed irreplaceable, and public written apology to Mr. Finnerty from both the Norfolk and Western Railway Company as an employer and from Trainmaster J. G. Smith personally and as a representative of the Norfolk and Western Railway Company for defamation of character and the adverse effect it has had on his standing in the community, his ability to obtain clients and employment and the general defamatory nature of the action.

STATEMENT OF FACTS: The facts in this case, most briefly stated, are that Brakeman L. J. Scott apparently suffered some sort of an on-duty injury. The Carrier's claim Agent, Mr. Savage, had called upon him, whether by appointment or not is not entirely clear, and was attempting to arrange a settlement.

The Claimant at the time was an employee of the Carrier, but off duty because of an injury not railroad connected, since December 2, 1976. Mr. Finnerty also occupied the office of Vice General Chairman, General Committee of Adjustment, Legislative Representative--1036; and had been designated of record as his legal counsel by the General Committee (Tr. pages 1-19 and 35). The Board presumes his position as outlined above was the reasons that the injured employee, L. J. Scott, approached Mr. Finnerty for advice.

Claim Agent Savage had visited the home of the injured employee, Brakeman Scott, on February 23, 1977 at which time the injured employee Scott informed him he was being represented by Claimant; and again in May, 1977, to ask for a representation letter which, according to such request, was furnished him.

This took place after the injured employee had talked to the General Chairman about his situation and had asked his advice on the matter. The General Chairman then recommended that the injured employee, Brakeman Scott, get in touch with Mr. Finnerty, the Vice Chairman and legal counsel; or with the other recommended UTU counsel.

18,000.00 - Back pay

It is the position of the Organization that the representation letter furnished by the injured employee at the request of Claim Agent Savage was for the purpose of insulating the injured employee from further direct visits. Said representation letter which is reproduced below seems to be the substantive cause of Claimant's discharge:

LAW OFFICES

MELANEY & PERKINS & FINNERTY
1033 SOUTH BRADDOCK AVENUE
PITTSBURGH, PA. 15218 • (412) 241-8130

LETTER

IN REFERENCE TO:

AIRMAIL ☐ FIRST CLASS MAIL ☐ INTER OFFICE ☐

FOR NORFOLK & WESTERN Rwy. CO.
Claims Department
J. J. Ryland, District Claims Agent
BREWSTER, OHIO

44613

HOW TO USE THIS

Time-Saver LETTER TO SAVE TIME.

Type or write your reply in the space below. Then mail the white copy to us and keep the pink copy for your files. You'll save time and effort, and we'll have your answer much faster! Thank you.

Dear Sir:

DATE May-5, 1977

DATE _____

Please be advised that I represent L.J. Scott, brakeman - Rook, Pa., IN RE: personal injuries and lost wages due to incident occurring at Rook Yard on December 10, 1976.

Kindly address any further questions with regard to this incident to me at the address above.

Very truly yours,

SIGNED

Timothy J. Finnerty

REORDER FORM NO. 82101

©DAY EMBLERS - PITTSBURGH, PA. 15212

Based upon the above Claimant was formally charged as follows:

"Brewster, Ohio
June 17, 1977

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Timothy E. Finnerty
129 Barnes Street
Pittsburgh, Pennsylvania 15221

Mr. Timothy E. Finnerty:

You are hereby notified to report to the office of the Assistant Superintendent at Rook, Pennsylvania, at 9:00 A.M., Friday, June 24, 1977, for a formal trial to determine the facts and your responsibility in connection with your unfaithfulness and disloyalty to the Norfolk and Western Railway Company by representing Brakeman L. J. Scott, an employee of this Carrier, as legal counsel in progression of a personal injury claim for reason of 'personal injuries and lost wages due to incident occurring at Rook Yard on December 10, 1976.'

"If you desire to have a representative and/or witnesses at the formal trial, please arrange for their presence.

Sincerely,

J. G. Smith
Trainmaster

Following witnesses arrange to be present:

Messrs. R. L. Musick
J. J. Ryland
J. R. Savage

Other witnesses may be called."

Subsequent to investigation, the Carrier wrote the Claimant as follows:

"Brewster, Ohio, July 15, 1977

Mr. Timothy E. Finnerty
329 Barnes Street
Pittsburgh, Pennsylvania 15221

Dear Sir:

Reference is made to the formal trial held in the Office of the Assistant Superintendent at Rook, Pennsylvania at 9:00 A.M., July 6, 1977, to determine the facts and your responsibility in connection with your unfaithfulness and disloyalty to the Norfolk and Western Railway Company by representing Brakeman L. J. Scott, an employee of this Carrier, as legal counsel in progression of a personal injury claim for reason of 'personal injuries and lost wages due to incident occurring at Rook Yard on December 10, 1976.'

For your responsibility as developed in the formal trial, you are hereby assessed discipline as follows:

'DISMISSAL'

Please arrange to return all company property, including switch key, lantern, Book of Rules, etc.

Yours truly,

J. G. Smith
Trainmaster

FINDINGS:

The Board has searched the entire record of this case with great care. The Carrier has the burden of proof to support its formal charge "to determine the facts and your responsibility in connection with your unfaithfulness and disloyalty to the Norfolk and Western,...."

The Carrier states in its submission, page 5:
"In view of Claimant's own testimony given at the trial, it is apparent Claimant represented Brakeman Scott as legal counsel in the progression of personal injury suit, etc."

However, commencing at page 38 of the transcript, testimony of Claimant is as follows:

- Q. Have you ever talked to Mr. Savage or any other agent for the Norfolk and Western regarding the claim of Mr. Scott?
- A. I have had no personal contact other than the letter that I sent with either Mr. Savage or Mr. Ryland.
- Q. Have you filed suit on behalf of Mr. Scott in the Court of the United States?
- A. No I have not.
- Q. As a union representative, do you have the right to represent Mr. Scott, whether or not you are an attorney?
- A. It is my understanding of the law that it is my right to so represent Mr. Scott, both as an officer of the court and as an officer of this union.
- Q. And in representing Mr. Scott, did you have any intentions of being disloyal or unfaithful to the Norfolk and Western Railway Company?
- A. None whatsoever. The only alternative I had in representing Mr. Scott was to say that, one, as he had contacted me relative to the visits of the railway claim agents and knowing that once an attorney had been attained, they would no longer talk to him, it being Mr. Scott's wish that he have no further contact with the railway claim agents as their visits had been unannounced and upset him. He contacted me and asked me if I would get in touch with them, which I did with letter, the one introduced as evidence here.

This evidence does not seem to have been rebutted in the record. There is further evidence in the record that the Claim Department has never contacted Mr. Finnerty as a representative for Mr. Scott on his personal injury claim. Tr., page 40. There is evidence that the Claimant was never notified he would not be permitted to handle railroad claims as an attorney.

There is no evidence Claimant ever entered into an attorney and client contract or fee arrangement or that there was an appearance in court or even conferences. The Claimant bases his right to counsel Brakeman Scott, which is all the record shows he actually did do, according to his union job and responsibility. He relied for his justification upon UTU vs Virginia, 177 US 1 which in a reasonably similar case, the Supreme Court said:

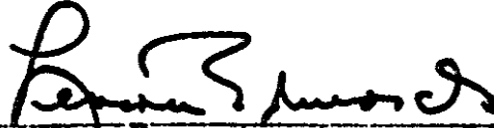
"It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. 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 or through a special department of their Brotherhood to advise concerning the need for legal assistance -- and, most importantly, what lawyer a member could confidently rely on -- is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

This seems to cover about any actions that the record shows had been engaged in by Mr. Finner by up to the time of the investigation. There is no showing that there has been any detriment to the Carrier.

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

AWARD: Claim sustained in that Claimant Finner is reinstated to his previous position with full seniority unimpaired and removal of said discipline from his record, together with pay for time lost from August 1, 1977, which the record shows was the date he was able to return to work from sick leave. The Board has no authority to go into apologies, and certainly other extraneous matters mentioned in the claim.

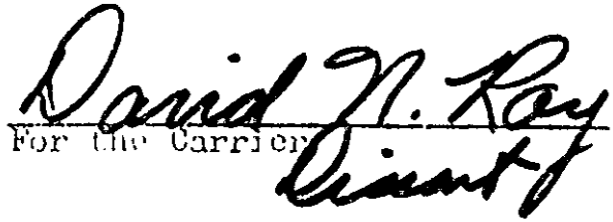
Carrier is ordered to make this award effective within thirty days.



Leverett Edwards, Chairman and Neutral



For the Employees



For the Carrier

Cleveland, Ohio

December 21, 1978