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The U.S. Court of Appeals for the Second Circuit in *United Transportation Union and Carmen J. Famulare v. National Railroad Passenger Corporation (AMTRAK)*, has reversed a district court's decision to vacate an arbitration award under the Railway Labor Act (RLA), declaring that employee union representatives have no per se immunity from discipline for conduct that violates company policy .

A Railroad Union Representative Is Not Protected from Discipline When Offering a Bribe to an Arbitration Witness

By Jack Lambremont and Chip McWilliams

The U.S. Court of Appeals for the Second Circuit has held that there is no per se immunity from discipline for the conduct of employees working in their union representational capacity who violate clear company policy, and that a contrary holding would upset the delicate balance of discipline that is subject to arbitration under the Railway Labor Act (RLA). In *United Transportation Union and Carmen J. Famulare v. National Railroad Passenger Corporation (AMTRAK)*, No. 08-0854-cv, 2009 U.S. App. LEXIS 26795 (2d Cir. Dec. 9, 2009), the court reversed a district court's decision that vacated an arbitration award on the theory that employees who are union representatives have a "cloak of immunity" and could not be disciplined for conduct that occurred while they were working in their union representational capacity, even if the conduct was a clear violation of company policies.

At issue in this case was whether the Special Board of Adjustment ("Board"), which sits as a panel with one panelist designated by the carrier, one designated by the union, and, in the event of a deadlock, one neutral panelist, failed to comply with the RLA or exceeded its jurisdiction under the RLA when it held that Amtrak was permitted to discipline an employee for conduct that occurred while that employee was functioning as a union representative.

Background

Carmen J. Famulare ("Famulare") began working as a conductor for Amtrak in 1994 and also served as the chairman of the United Transportation Union, which represents certain classes of Amtrak employees. In early 2005, Famulare represented an Amtrak employee at a disciplinary hearing, during which he allegedly attempted to bribe a witness by offering free transportation on Amtrak between Poughkeepsie and Buffalo, New York. Amtrak charged Famulare with violating its "Service Standards for Train Service and On-Board Service Employees," as well as interfering with the parties' contractually agreed-to disciplinary process, and terminated his employment.

The union and Famulare appealed his termination through binding arbitration before the Board. After reviewing the record, the Board concluded that Famulare had violated company policy and found that, while significant latitude is provided to employees when acting in their representational capacity, "that latitude falls far short of being a 'cloak of immunity.'" The Board therefore upheld Amtrak's decision to terminate Famulare's employment. The union sued in federal district court to set aside the Board's decision.

The Second Circuit Reverses the District Court

The district court granted summary judgment for the union and vacated the Board's decision. It held that the RLA forbids employers from exercising any authority over the conduct of employees' representatives while they are engaged in their representative capacity and that in upholding the discipline, the Board failed to comply with the RLA provision governing employees' designation of representatives. Specifically, the district court found that section 152 Third of the RLA provides employees of a railroad carrier a *per se* sanctuary from discipline for misconduct engaged in while functioning as a union official. The district court concluded that, "[f]iring an employee for conduct committed as a union representative, and the threat thereof, plainly interferes with employees' choice of the representative."

Section 152 Third of the RLA is entitled "[d]esignation of representatives," and provides that:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

On appeal, the Second Circuit found no textual or precedential support for the district court's conclusion that section 152 Third creates a "cloak of immunity" for the misconduct of railroad employees functioning in a representative capacity. The court also agreed with the Board's view that such a doctrine as espoused by the union "would have deleterious effects on the 'time-tested disciplinary process' through which railroad labor disputes are resolved." The court noted that "Famulare sought to influence the testimony of a witness by offering *free Amtrak travel at Amtrak's expense*. Thus, he was attempting to undermine Amtrak's disciplinary process and effectively stealing from his employer at the same time." The Second Circuit then reversed the district court, finding that the Board fully complied with the RLA and that "[i]t is beyond doubt that an employer retains the authority to discipline its employees for such conduct, regardless of the context in which it occurs."

What this Decision Means for Employers

The Second Circuit's decision in this case is significant for employers who are carriers within the meaning of the RLA because it eliminates an artificial "immunity from discipline" argument for employees who are also stewards or other union representatives. Under the district court's interpretation of the RLA, any discipline imposed on an employee who also happens to be a union representative would have automatically been subject to challenge as a violation of Section 152 Third if the employee could show that the conduct was somehow related to his or her duties as a union representative. The Second Circuit has now rejected this interpretation of the RLA and reaffirmed carriers' prerogative to maintain and enforce discipline regardless of an employee's status as a union representative, subject, of course, to the Board's review of the facts of each case.

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