

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Kenneth R. Smoot)
)
Plaintiff,)
)
-VS-)
)
)
UNITED TRANSPORTATION)
UNION, et al.,)
)
Defendants.)

CASE NO. 1:94CV0485
JUDGE PETER S. ECONOMUS

MOTION FOR RECUSAL

COMES NOW, KENNETH R. SMOOT, Pro se, and respectfully files this his Motion for Recusal pursuant to 28 U.S.C. ' 455 and would show the Honorable Court as follows:

Throughout the progression of this case, and predecessor case/s involving this pro se litigant, this Honorable Judge has shown antagonism toward the position of this party with regard to judicial matters, which should be seated in fact, reason and law. These issues might never, on their individual merits reach the necessary threshold for disqualification under 455 (a), other than, taken as a whole, to clearly show a continued pattern of continued departure from the accepted and usual course of judicial proceedings. As such, the Aimpartiality might reasonably be questioned@, with respect to this Honorable Judge, see Liteky v. United States, 510 US --, 127 L. Ed 2d 474, 114 S

Ct 1147.

Succinctly stated, it appears that the prevailing case law, commencing with the precedent set in *Berger v. US*, 255 U.S. 22 (1921) would ascribe to the theory that, at a minimum, the decision of the judge would be **Areviewable@**, i.e. **A**It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause.@

In the instant case, as is unambiguously enunciated in the **A**trial transcript@ of the March 30, 1998 Summary Bench Trial, that the basis of the issuance of statutory and punitive damages, in addition to an undisclosed amount of attorneys= fees, with extreme antagonism toward this Pro se litigant, had origin in a prior decision of this Honorable Judge.

Specifically, the Honorable Judge relied on a decision made in a separate case, which was not reviewable, due to joint actions of this Honorable Judge with the other parties, i.e. the United Transportation Union (UTU) and its agent/representative Mr. Robert W. Earley, over which the Court retained jurisdiction for enforcement. These joint actions with respect to this and other Pro se litigants, served to defeat the purposes of justice.

The facts are clearly part of the record of this Court, in that in two previous cases, 1:94CV0674 and 1:94CV0597, this Court held a permanent injunction hearing instead of a jury trial, though all parties had requested a jury trial and all discovery and pretrial requirements were complete. The purpose for a determination of matters involving an alleged violation of the Federal Wiretap Act, by this Pro se litigant. However, during the permanent injunction hearing, no testimony was taken from this Pro se litigant concerning the alleged illegal interception nor from the party whose oral communications were allegedly intercepted. This Honorable Judge felt that no testimony was necessary, he had already made his decision concerning matters pertaining to the alleged violation of the Federal Wiretap Act. Indeed, he found four members of the UTU Executive Board, whose undisputed testimony was they had never heard the tape or read the transcript, in violation of the Federal Wiretap Act.

This Honorable Judge then allowed settlement of the matter between two of the parties, i.e. UTU and Earley, in the styled **ASettlement Release and Agreement@**, wherein the issues were settled with prejudice. A Pro se litigant was an intervener in this case, however, this Honorable Judge allowed settlement absent participation or knowledge on the part of the Pro se

intervener. In the case involving the two Pro se litigants, this Honorable Judge allowed for dismissal, without prejudice.

The Permanent Injunction was appealed by both Pro se litigants, however, the Court of Appeals for the Sixth Circuit ruled that the appeal was moot, since the Permanent Injunction had been vacated.

It was this unreviewable vacated Permanent Injunction that served as the basis for a finding of statutory damages, punitive damage, and attorneys= fees against this Pro se litigant, without allowing the Pro se litigant any right to a proper defense against same. This action has culminated a long history of unreasonable and clearly disparate judicial rulings on the part of this Honorable Judge against this Pro se litigant, all of which will not be enumerated, however, the following are the most significant for purposes of this motion.

First, concerns the original amended complaint, properly filed by this Pro se litigant. Though this Pro se litigant, has never expected preferential treatment, he has by the same token expected to be treated fairly, and consistent with fact, reason and law. In the instant case, the amended complaint was unopposed by the other parties, however, same was denied. A[a] pro se litigant must be given leave to amend his or her complaint unless it is >absolutely clear that the deficiencies of

the complaint could not be cured by amendment.= A (Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir.) (quoting Broughton v. Cutter Labs., 622 F2d 458, 460 (9th Cir. 1980)).

Second, this Honorable Judge granted UTU summary judgment after three and one half (3²) years on a motion filed in violation of the Case Management Plan, stating he didn't have jurisdiction of the claim concerning 45 U.S.C. ' 153(q). However, the Certified Docket in this case clearly shows a Motion to Dismiss of Defendant Public Law Board 3882 (#16) filed by Emily M. Sweeney, United States Attorney which states in pertinent part:

AConsistent with the preceding case authority, this reviewing court (Judge Paul R. Matia) has full jurisdiction to review the arbitration award in question without the presence of Public Law Board 3882. Title 45 U.S.C. ' 153, First (q), expressly provides for such authority - A[o]n such review . . . the order of the [arbitration institution] may be set aside, in whole or in part, or remanded@ The role of the arbitration institution in the review process outlined under 45 U.S.C. ' 153, First (q) is limited to providing a record of its proceedings to the reviewing court. AS broadly recognized by the court, A[T]his limited role does not impinge upon the rights or ability of the petitioner to obtain full judicial review and relief in the proceeding.@ Fong v. American Airlines, Inc., 431 F.Supp 1340, 1343 (N.D. Cal. 1977).

Based upon the foregoing authorities, it is asked that the court dismiss Public Law Board 3882 as a defendant in this action.@

In effect, the Summary Judgment given UTU and CSXT was in

direct conflict with the filing of the United States Attorney and serves to nullify the intent, language of Congress and Judicial precedent of 45 U.S.C. ' 153, First (q) in its entirety.

Third, the Certified record is devoid of any notation whatsoever indicating there was ever a pretrial or final pretrial hearing in Case No. 1:94CV0485. The record does indicate a Status Conference was scheduled for February 18, 1998 which apparently turned out to be a styled pretrial conference.

While my attorney failed to meet numerous requirements of the Trial Order, even the opposition attorney/s failed to file briefs on disputed issues which were required by item 3b of the trial order. Significant is the fact UTU and CSXT filed Findings of Fact and Conclusions of Law pursuant to the requirements of LR 16.9, Summary Bench Trial, which were not called for in the Trial Order and which are adequate testimony that this was a Summary Bench Trial on damages.

Fourth, this pro se litigant was allowed to give no evidence whatsoever in Case No. 1:94CV0485. Despite the ineffective assistance of his Attorney in failing to make his exhibits part of the record, the Honorable Judge allowed no evidence on disputed issues during the summary bench trial on damages. For example, when attorneys for UTU and CSXT misrepresented that they already had injunctive relief in this

case, presuming a unified defense wherein Earley was the **Arepresentative@** of UTU, the Honorable Judge denied pertinent evidence which would refute such statement, i.e., Earley sued the UTU and got injunctive relief **against** UTU, **not for** UTU.

Fifth, any person might reasonably question the impartiality of a Judge who twice does away with a scheduled jury trial in favor of a bench trial which fails to allow evidence and testimony from key participants to the disputed matters. In that regard, it is noted that the certified record of these suspect proceedings have **never** been provided to the Sixth Circuit over three separate appeals now. It appears the District Court, under the jurisdiction of this Honorable Judge, either can't or won't supply the records to the Sixth Circuit pursuant to FRAP Rule 11.

The US Constitution is clear and unambiguous with respect to the separation of powers, and clearly places the responsibility for the making of law with the US Congress, and the enforcement of same with the Judicial.

In the instant case, clearly the UTU and CSXT have created a styled **Aunified@** defense against this Pro se litigant, who has come before this Honorable Court with a valid complaint concerning a clear violation of Congressionally enacted Federal Statute, i.e. 45 USC ' 151.

The purpose of the Railway Labor Act was to ensure the stability of the rail industry, in both the public and private interest, and to allow the employees the benefit of the intervention of a **A**disinterested third party[@] when a dispute existed, with judicial review possible, see 45 USC " 151 to 188.

Congress further enforced the rights of the employees, by enacting the Labor Management and Disclosure Act, to, at a minimum, **A** . . . accomplish the objective of a free flow of commerce it is essential that labor organization, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.[@], see 29 USC ' 401 (a), with enforcement by the courts, see 29 USC ' 412.

However, this Honorable Judge has shown a definite antagonism toward this Pro se litigant, in applying the literal application of the desires of rail management and labor, as was clearly portrayed by the unified position of these parties, see Fact Finding Report of the **A**Commission on the Future of Worker-Management Relations, 10/20/1993, pg. 98-103", stating in pertinent part:

ADespite differences of interest and experience, the major representatives of labor and management governed

by the Railway Labor Act responded unanimously that this Commission should not recommend any changes to the Act.

This unified reaction from the parties results not from a failure to recognize their problems, but rather, from a common concern as to the solution to those problems. Unlike the National Labor Relations Act, which was enacted through substantial labor-management and political conflict, the 1926 Railway Labor Act was made law with the full agreement of railroad labor and management, and later amended to include the airline industry after discussion with the parties. These parties regard the Railway Labor Act as their creation, achieved through a bi-partite process, and they are justly proud of their role in the enactment of the statute. They wish to preserve and improve the processes under the Act through joint discussion and negotiations, rather than to have solutions imposed upon them by third parties. (Emphasis)

The actions of this Honorable Judge have allowed the rail union, i.e. UTU, and the rail carrier, i.e. CSXT, to fashion settlements in the litigation in which this Pro se litigant has been involved with total disregard to fact, reason and law, at all time behind closed doors. See trial transcript of March 30, 1998 Summary Bench Trial, on the part of opposing counsel, AI was just going to agree with the UTU here, and also point out that this is no different from conferences that are held in chambers before and during the course of lawsuits. Of course, this Honorable Judge replies, ~~That's~~ right.

These closed door sessions could only have been facilitated by the presence of a willing attorney for this Pro se litigant,

and though some counsel realized the **A**corrupt nature of the proceedings and attempted to withdraw, this Honorable Judge would not allow same. When this Pro se litigant dismissed same attorney for cause, this Honorable Judge made a marginal entry, denying withdrawal of counsel. (See CIVIL DOCKET FOR CASE # 94-CV-485, marginal entry orders of 7/20/98)

The issues of justice with respect to this Pro se litigant, and others so situated, have not been well taken by this Honorable Judge, i.e. **A**. . . it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that **A**to perform its high function in the best way >justice must satisfy the appearance of justice. (Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 1988)

As stated earlier, the purpose of this motion is to prevent further injustice in future actions in this cause, specifically, the award of attorney fees currently scheduled for hearing on September 11, 1998. No damages or attorneys fees are appropriate in this cause until a proper adjudicatory ruling from a competent court of jurisdiction or jury determines reasonable expectation of privacy, privacy within the meaning of the act,

and intent. In addition, UTU and CSXT, counterclaim plaintiffs have not demonstrated any loss as result of counterclaim defendant Smoot's conduct (other than what UTU voluntarily paid ~~A~~representative@ Earley to dismiss with prejudice), nor any profit gained by counterclaim defendant Smoot. See *Nalley v. Nalley*, 53 F.3d 649 (4th Cir.1995). However, pursuant to the above averments, absent recusal, it is doubtful this Honorable Judge will properly use the discretion given by Congress concerning the issuance of damages and attorneys fees. See Motion in Opposition to Attorney Fees filed contemporaneously filed, Motion for a New Trial, Amended Motion for a New Trial which are incorporated herein as if fully rewritten.

PREMISES CONSIDERED, Kenneth R. Smoot, Pro se, respectfully requests the Honorable Judge recuse himself immediately from this cause of action, in the interest of Justice.

Respectfully submitted,

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