U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ROBERT POWERS,

COMPLAINANT,

v.

UNION PACIFIC RAILROAD COMPANY,

RESPONDENT.

ARB CASE NO. 13-034

ALJ CASE NO. 2010-FRS-030

DATE: MAY 23 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James Ferguson, Esq. (argued); *Law Office of H. Chris Christy*, North Little Rock, Arkansas; Stephen M. Kohn, Esq. (argued); *Kohn, Kohn & Colapinto, LLP*; Washington, District of Columbia

For the Respondents:

Tim D. Wackerbarth, Esq. and Joseph P. Corr, Esq.; *Lane Powell PC*, Seattle, Washington; Clifford A. Godiner, Esq. (argued); *Thompson Coburn LLP*, St. Louis, Missouri

For the Assistant Secretary of Labor for Occupational Safety and Health:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther; Esq., and Mary E. McDonald, Esq. (argued); *U.S. Department of Labor, Office of the Solicitor*, Washington, District of Columbia

For Project on Governmental Oversight as Amicus Curiae

Scott Amey, Esq.; Project on Governmental Oversight, Washington, District of Columbia

For National Whistleblower Center, National Employment Lawyers Association, Trucker's Justice Center and Teamsters for a Democratic Union as Amicus Curiae

Jason Zuckerman, Esq. (argued) and Dallas Hammer, Esq.; *Zuckerman Law*, Washington, District of Columbia

For Edna Fordham as Amicus Curiae

Thad M. Guyer, Esq.; T.M. Guyer and Ayers & Friends, PC; Medford, Oregon; Thomas Devine, Esq. (argued); *Government Accountability Project*, Washington, District of Columbia

For Association of American Railroads as Amicus Curiae

Louis Warchot, Esq. and Daniel Saphire, Esq.; *Association of American Railroads*, Washington, District of Columbia; Ronald M. Johnson, Esq. (argued) and Mikki L. McArthur, Esq.; *Jones Day*, Washington, District of Columbia

For Chamber of Commerce of the United States of America, American Trucking Associations, Inc. as Amicus Curiae

James E. Gauch, Esq.; *Jones Day*, Washington, District of Columbia; Steven P. Lehotsky, Esq. and Warren Postman, Esq.; *U.S. Chamber Litigation Center*, Washington, District of Columbia; Prasad Sharma, Esq. and Richard Pianka, Esq.; *ATA Litigation Center*, Arlington, Virginia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*. Judge Corchado, concurring. Judge Royce, dissenting.

ORDER VACATING THE ADMINISTRATIVE REVIEW BOARD'S DECISION AND ORDER OF REMAND AND RETURNING THE CASE TO THE ADMINISTRATIVE REVIEW BOARD FOR DECISION

On January 14, 2015, the Administrative Review Board (Board), sitting en banc, held oral argument in this case arising under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and implemented by 29 C.F.R. Part 1982 (2015). After reviewing the case en banc, the Board issued a Decision and Order of Remand (with full dissent) on April 21, 2015. On March 11, 2016, the Board issued an order holding the case, currently pending before the Office of Administrative Law Judges, in abeyance.

After briefs were submitted in this case, but before oral argument was held before the Board, one of its members who participated in the Board's en banc review of this case, Judge E. Cooper Brown, placed at least one telephone call to and spoke about this case with an attorney whose firm came to represent a party in this case and that was affiliated with an amicus organization that filed a brief in this case. Judge Brown first informed the Board that he made this call on November 18, 2015. The Board then notified the parties of this activity in its March 11, 2016 Order and invited their responses to this activity. The Board has now received responses from both parties.

The Board now concludes that Judge Brown should be disqualified. Judge Brown acknowledges that his impartiality in this case might reasonably be questioned, and we agree.

This necessitates that Judge Brown be disqualified from this case, and by this Order, he is hereby disqualified.

Given Judge Brown's disqualification and to remedy any appearance of partiality, the appropriate relief is to vacate the decision and order in which Judge Brown participated. Respondent has requested that Judge Brown be "retroactively" recused in this case. Respondent does not cite to, and the Board has not been able to find, any authority supporting a "retroactive" recusal. Because the case is still pending, vacating our prior decision and order will permit us to decide the case without any appearance of partiality that might arise out of Judge Brown's participation.

The Board further determines that other grounds that the parties raised are insufficient to require any other member of the Board to recuse or be recused in this case.

Accordingly, the Board's April 21, 2015 Decision and Order of Remand (with full dissent) is **VACATED**. Consequently, the Board's en banc review of this case is still pending, but without the participation of Judge Brown or Judge Lisa W. Edwards, who has left the Board, but with the addition of Judge Anuj C. Desai, who has been appointed to the Board. The Board will prioritize its disposition of the case and issue its decision upon the completion of its review of this case.

SO ORDERED.

[redacted]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[redacted]

ANUJ C. DESAI
Administrative Appeals Judge

Judge Corchado, concurring.

I concur with the majority decision but I wish to expressly emphasize that I rely on the objective standard used in the federal courts. To begin with, due process requires "an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). *See also Anderson v. Peninsula First Dist.*, 2016 WL 1267838 (E.D. Calif. 2016)(actual bias or the appearance of bias of one member of a tribunal violates due process) (quoting *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995)). "This applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 47

(1975)(citations omitted). In addition to requiring an absence of actual bias, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). The APA (5 U.S.C. § 557) and the ABA Model Code of Judicial Conduct (Canon 2.9) prohibit ex parte communications and require disclosure of all communications involving less than all the parties. See Canon 2.9(A)(1). The Board has a staff in the office to communicate with litigants so that no Board member has to communicate with a party about a pending case. The staff's role should provide some comfort to lawyers in adversary proceedings before the Board and trust that no Board member will unilaterally contact only one party, even if it is only once or twice for whatever reason.

When faced with a question of bias, the federal courts consider the "totality of circumstances" and, more specifically ask whether "the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case." *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002). *See also In re Kensington Intern. Ltd.*, 368 F.2d 289, 294 (3d Cir. 2004)(same). I reach my decision with this standard in mind, looking at all the surrounding circumstances and statements relevant to the question of impartiality. Among those circumstances, I find most troubling is that attorneys of record were contacted so near the time for oral argument on a fundamental issue of importance that transcends the case at hand, where a number of amicus briefs were filed. Given the information known to the Board, and case precedent relevant to resolving disqualifications of a panel member, I am confident that a reviewing court would find no arbitrary conduct in the Board's decision to vacate our previous decision in this matter, which has yet to reach final conclusion. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). The solutions offered by the parties were somewhat extreme and polar opposites, and so we have chosen the solution that balances the interests of all the parties as much as possible.

[redacted]

LUIS A. CORCHADO
Administrative Appeals Judge

Judge Royce, dissenting.

I agree with both parties that the March 11, 2016 Order to Hold the Case in Abeyance appeared untimely, lacked critical evidentiary support, and was possibly *ultra vires*. Response Filed by Complainant's Appellate Counsel (Complainant's Response) 6, 8, 9; Union Pacific's Response to Order and Motion to Conduct Discovery or, in the Alternative, To Disqualify (Union Pacific's Response) 1, 4, 5. Nonetheless, a motion to disqualify Judge Brown is before us. Both parties cite the Administrative Procedure Act, 5 U.S.C. § 557, as controlling. Complainant's Response 4-6; Union Pacific's Response 9-10. Under the APA, Judge Brown should be allowed to either (1) issue an order denying the motion for disqualification along with the reasons therefor or (2) under § 557(d)(1)(C)(ii), disclose the substance of any improper ex parte communication. This process would be consistent with the ABA Model Code of Judicial Conduct (2011 Edition) Rule 2.11, whereby a judge subject to disqualification "may disclose on

the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification."

In the context of this proceeding, I am not aware of any authority endowing this Board with the power to disqualify one of its Members. But assuming we have the authority, I do not agree that the actions of Judge Brown, which have given rise to this order of disqualification, warrant either disqualification or the consequent necessity to vacate our April 21, 2015 Decision and Order of Remand in this case. As far as I know, the evidence supporting the Board's disqualification of Judge Brown implicates, at most, "an appearance of impropriety." Three circuits have held that recusal based upon the appearance of impropriety does not apply to administrative law judges based upon the argument that "if the 'appearance of impropriety' standard of 28 U.S.C. § 455(a) was applicable to administrative law judges, they would be forced to recuse themselves in every case. *See Greenberg v. Bd. of Governors of Fed. Reserve Sys.*, 968 F.2d 164, 166-67 (2d Cir. 1992); *see also Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir.1998)." *Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2004). The Ninth Circuit further held that "actual bias must be shown to disqualify an administrative law judge." The same reasoning applies to the members of this Board who are designated as "administrative appeals judges." I am not aware of any evidence that would constitute "actual bias" on the part of Judge Brown.

Finally, even if there were an ex parte communication, it would not warrant vacating our April 21, 2015 Decision and Order of Remand. "[I]mproper ex parte communications, even when undisclosed during agency proceedings, do not necessarily void an agency decision. ... [A] court must consider whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect." *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982). Given the evidence of alleged ex parte communications to which I am privy, the communications were not relevant to the merits and would have had no effect on our April 21, 2015 Decision and Order of Remand.

[redacted]

JOANNE ROYCE
Administrative Appeals Judge