

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

U.S. DISTRICT COURT
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UNITED STATES OF AMERICA,)

Plaintiff)

vs)

Case No. 10-cv.000435 - JAW

GLENN A. BAXTER,)

Defendant,)

(This document published world wide at www.k1man.com/d6 and www.k1man.com/alj Also see www.k1man.com/g)

DEFENDANT'S RESPONSE TO Plaintiff's REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Now comes Glenn A. Baxter, P.E., K1MAN, Defendant, and makes this sworn affidavit of his own personal knowledge regarding the Plaintiff's above referenced pleading and claims that there are genuine issues of material facts to be tried by the requested trial de novo. To comply with local Rule 56 with minimum confusion for the Court, Defendant made hand notations on Plaintiff's original pleadings with reference numbers designated by #1, #2, #3, etc., to refer to Defendant's Master Response Key as follows:

DEFENDANT'S MASTER RESPONSE KEY

#1 Admit: Defendant admits Plaintiff's pleading but claims that this (these) is (are) a genuine issue (issues) of material fact(s) that need(s) to be tried by a jury.

#2 Deny: Defendant denies Plaintiff's pleading and claims that this (these) is (are) a genuine issue (issues) of material fact(s) that need(s) to be tried by a jury.

#3 Qualify: Defendant qualifies Plaintiff's pleading and claims that this (these) is (are) a genuine issue (issues) of material fact(s) that need(s) to be tried by a jury.

#9 Defendant neither admits or denies Plaintiff's pleading but claims that there are genuine issues of material fact that need to be tried by a jury.

#4 Mere reference to a licensee's web site in a non commercial and non pecuniary context does not violate FCC Rule 97.113 (a)(3) which bans transmissions over amateur radio with a pecuniary interest for the licensee. This is a genuine issue of material fact as to whether the licensee had any pecuniary intent or received as much as one dime if income on a case by case basis with regard to the web site reference and should be decided only by a jury.

#5 Defendant does not claim that FCC Rule 96.111(b)(6) is authorization for radio interference, but rather that a published and scheduled information bulletin transmission with the intent to disseminate amateur radio information cannot be illegal interference to another station, the precedent being that of ARRL's bulletin station, W1AW, which has transmitted published and scheduled information bulletins daily since 1947, and according to the Plaintiff's outrageous claim, has never generated a complaint and never been cited for causing interference when, obviously, incidental interference is a natural and necessary result of published and scheduled information bulletins. In fact, the FCC ruled on an FCC petition by F. Bentley Adams (to restrict amateur information bulletins) that amateur information bulletins are no less important than other amateur radio communications, which thus triggers FCC Rule 97.101(b) which states that:

".....Each station licensee and each control operator must cooperate in selecting transmitting channels and in making the most effective use of the amateur service frequencies....."

and FCC Rule 97.101(d) which states that an amateur radio operator must not have the intent to cause interference:

"...No amateur operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal."

#6 Defendant merely claims that said letter acknowledges that Defendant's bulletin station is on par with ARRL's W1AW bulletin station.

#7 This is a genuine issue of fact that needs to be determined by a jury.

#8 The publishing of a bulletin transmission schedule 30 days in advance merely suggests that incidental interference might occur but that it does not automatically constitute illegal willful or malicious interference, which also happens to be a felony under Sections 333 and 501 of the 1934 Communications Act, as amended. The fact that Plaintiff claims that W1AW has never been cited for transmitting published and scheduled information bulletins (See DECLARATION OF WILLIAM T. CROSS, page 2, paragraph 3), by estoppel, bars the Plaintiff from citing the Defendant for doing the same thing.

#10 Plaintiff has not provided a transcript of the alleged communications, and thus this allegation must be barred.

#11 McNamara's November 3, 1989 letter (*See Exhibit 2*, attached to Defendant's AMENDED MATERIAL FACTS AS TO WHERE A GENUINE ISSUE NEEDS TO BE TRIED BEFORE A REQUESTED JURY BY TRIAL DE NOVO dated 31 May 2011; can also be viewed at www.k1man.com/e5a) did, indeed, address the issue of whether Defendant's station, K1MAN caused interference to Mr. Black's station since the letter was an official FCC response to Mr. Black's letter which was complaining to the FCC about being interfered with by K1MAN).

#12 McNamara's November 3, 1989 letter (*See Exhibit 2*, attached to Defendant's AMENDED MATERIAL FACTS AS TO WHERE A GENUINE ISSUE NEEDS TO BE TRIED BEFORE A REQUESTED JURY BY TRIAL DE NOVO dated 31 May 2011; can also be viewed at www.k1man.com/e5a) did, indeed, pre approve future legal bulletin transmissions from Defendant's station, K1MAN, and this is a genuine issue of material fact that needs to be determined by a jury.

#13 Defendant denies that it's legal K1MAN information bulletins constitute malicious and willful interference, and this is a genuine issue of material fact that needs to be determined by a jury.

#14 Publishing a schedule per FCC rule 97.111(a)(6):

"Information bulletins....where the schedule of normal operating times and frequency shall be published at least 30 days in advance of the actual transmissions...."

does not relate to only to a club station control operator accepting compensation, since the obvious purpose of publishing a transmitting schedule is to minimize legal incidental interference from a bulletin station whether or not is a club station or whether or not the control operator is being paid. To argue otherwise is to argue that incidental interference is only legal from a club station with a paid control operator and not legal from K1MAN. Such argument constitutes unconstitutional discrimination against K1MAN by FCC Special Counsel W. Riley Hollingsworth, who would later be an ARRL (W1AW) Assistant Director, and the FCC. Plaintiff is stopped from making such an argument.

The K1MAN transmission on March 31st was, in fact, a legal and scheduled information bulletin, as authorized by FCC rule 97.111(a)(6):

"Information bulletins....where the schedule of normal operating times and frequency shall be published at least 30 days in advance of the actual transmissions...."

#15 In the instant case there are allegations that Defendant station K1MAN interfered with other licensed amateur radio operators. Defendant claims that it was the other way around, and that those other licensed amateur radio operators were interfering with him, and encouraged by FCC Special Counsel, W. Riley Hollingsworth, in criminal violation of Sections 333 and 501 of the 1934 Communications Act, as amended. These are genuine material facts in dispute which can only be determined by a jury.

#16 Defendant makes no claim of exclusive use of any frequency. A published information bulletin schedule does not constitute exclusive use any more than reserving a tennis court for a certain date and time constitutes exclusive use of the tennis court. Again, the precedent here is the legal transmitting of information bulletins per a published schedule by ARRL's W1AW since 1947. Defendant's station, K1MAN, has no legally valid distinction from ARRL's W1AW.

#17 Yes it does in the sense that when Defendant's station K1MAN transmits an information bulletin per a published schedule, K1MAN has the legal right not to be interfered with by other licensed amateur radio operators. The FCC has officially ruled that information bulletins are no less important than any other amateur radio transmission.

#18 Transmitting information bulletins per a published schedule, is legal, regardless if incidental interference, and the precedent is ARRL's legal practice of doing so since 1947 without ever being cited by the FCC.

#19 The Commission is wrong.

#20 Defendant alleges that Mr. Webber knew full well that said tape was not made by FCC HFDF personnel and was perpetrating a fraud on this court to claim that it was.

#21 Since the instant case is a trial de novo, the alleged Notice of Apparent Liability and FCC findings contained therein are not relevant and are barred from this litigation.

#22 Since the instant case is a trial de novo, the alleged Forfeiture Order and FCC findings contained therein are not relevant and are barred from this litigation.

#23 Defendant alleges that Mr. Larrabee knew full well the said alleged recordings were not made by Mr. Winters and was perpetrating a fraud on this Court.

#24 Ms. Mallay and Mr. Larrabee are lying. Defendant has never made on air references to subscriptions to his newsletter and both Mallay and Larrabee have thus perpetrated a fraud on this Court.

#25 Ms. Mallay is incorrect; the ongoing communications constituted intentional interference to Defendant's legal and scheduled information bulletins. This is a genuine issue of material fact that needs to be decided by a jury

#26 Mr. Winters is incorrect; the ongoing communications constituted intentional interference to Defendant's legal and scheduled information bulletins. This is a genuine issue of material fact that needs to be decided by a jury.

#27 Defendant's arguments alleged as "mostly legal, not factual ones" is not sufficient to carry a Motion For Summary Judgment, since a single genuine material factual dispute would be

required to be settled by a jury. Of course legal issues will be decided by this Court and possibly by the First Circuit Court of Appeals. The problem in the instant case is deciding which issues are factual and which are legal. For example, fact: "Judge, he tried to kill me with a hammer!" True enough! "But Judge, the other guy was taking swings at me with a butcher knife." Both facts could be true. Both acts are arguably illegal. The jury must decide who intended to illegally murder and who intended perfectly legal self defense.

In the instant case there are allegations that Defendant station K1MAN interfered with other licensed amateur radio operators. Defendant claims that it was the other way around, and that those other licensed amateur radio operators were interfering with him, and encouraged by FCC Special Counsel, W. Riley Hollingsworth, in criminal violation of Sections 333 and 501 of the 1934 Communications Act. Which fact is which can only be determined by a jury.

Contrary to Plaintiff's assertion, "specific facts in evidentiary form" are already in evidence and in the record, such as the volumes of transcripts of K1MAN transmissions supplied by the Plaintiff. A jury must decide, after hearing witnesses and cross examination, who was interfering with who.

#28 Defendant contends that no forfeitures are reasonable in this case.

#29 There is a factual dispute as to whether the legally allowable request for information was answered or not. This a genuine issue of material fact that needs to be decided by a jury.

#30 Defendant was merely pointing out that he has an unblemished record with the Boston FCC office, having the most direct jurisdiction over the defendant, of fully cooperating and providing legally requested information.

#31 It is obvious that ARRL's W1AW legal information bulletins will cause incidental interference.

#32 ARRL's bulletin station, W1AW, which has transmitted published and scheduled information bulletins daily since 1947, and according to the Plaintiff's outrageous claim, has never generated a complaint and never been cited for causing interference when, obviously, incidental interference is a natural and necessary result of published and scheduled information bulletins. To suggest that there have been no complaints against ARRL is simply ludicrous. That ARRL has never been cited for interference is admission by Plaintiff of unconstitutional discrimination. Of course ARRL has never been cited. ARRL has never violated FCC rules, and neither has the Defendant. Defendant's only crime here is not being an ARRL paid employee or an ARRL Assistant Director like former FCC Special Counsel W. Riley Hollingsworth, Esq., K4ZDH. See attached letter and affidavit:

A F F I D A V I T

I, George F. Arsics, Jr., Amateur Radio Operator W2ZB, of Powder Springs, Georgia, hereby make the following to be my sworn affidavit:

Between 1988 and 1996 I was a FCC watch officer assigned to the monitoring station in Powder Springs, Georgia. I voluntarily resigned in 1996 when I could no longer tolerate the corruption and mismanagement in the Federal Communications Commission, CIB in particular.

From my personal experience, I declare the following facts. When we received Freedom of Information (hereafter referred to as "FOI") requests, I was normally told by supervisory personnel to "give them something which is of no use to them." In other words, I was directed by management to select items from the case folder which were of little or no use to the entity making the FOI request. Under no circumstances was I ever allowed to send the requesting entity information which placed the commission in a bad light or which would weaken the commission's case against the party making the FOI request. All FOI requests were normally routed through the Washington headquarters and not the field office. Stated another way, we did not send the FOI material directly to the requesting entity.

Regarding violation notices, if there was insufficient evidence to support the notice, I was directed by management personnel to "send it to them and let them deny it." It would seem, the intent was to intimidate and harass.

There was an unwritten rule never to cite law enforcement agencies or large organizations with legal staffs. I was never given a reason

Affidavit of George F. Arsics, Jr., W2ZB

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why we did not cite law enforcement agencies, unless it was some sort of professional courtesy. This, of course, smacks of selective enforcement and inequitable enforcement of the commission's rules and regulations. In the case of large organizations, the fear was of going up against resident legal expertise and ending up embarrassing the commission. It was assumed that private citizens did not have access to the same legal resources that corporations did. Thus, private citizens, such as amateur radio operators, were more vulnerable to selective enforcement.

In regard to K1MAN (Glenn A. Baxter) activity, we received numerous telephone complaints and a few written complaints at Powder Springs

refer complainants to the Washington headquarters. If I recall, by late 1992 the number of complaints had dwindled to maybe one a quarter.

I saw the FCC and CIB from the inside for eight years, and it was NOT a pretty sight. Actually, for a career military person where duty, honor, and country came first, the FCC was a cesspool of corruption where only money and egos mattered.

I hereby swear to the above statements according to my own personal knowledge, information, and belief.

(signed)

George F. Arsics, Jr., W2ZB

Date

Sworn before me:

(notarized)

Notary Public

#33 Whether a particular reference to a web site in a non commercial context constitutes illegal pecuniary interest on a case by case basis is a genuine issue of material fact that must be decided by a jury.

#34 Profitability is not the issue here. Defendant was receiving no income whatsoever regarding the credit card and thus there was obviously no pecuniary interest.

#35 This issue has been dropped by the Plaintiff.

#36 Defendant objects to the characterization "advertising" which implies a commercial context when the web site reference was made in a non commercial and therefore non pecuniary context.

~~#37~~ Plaintiff is not liable for any forfeiture unless he loses the instant trial de novo and all appeals.

Wherefore, Defendant requests that the Motion For Summary Judgment be denied.

Dated: 28 June 2011



(signed)

Glenn A. Baxter, P.E., K1MAN

Now comes the Defendant, Glenn A. Baxter, P.E., K1MAN, and affirms, through his own personal knowledge or belief, by his signature above, that everything in the above court pleading and all the attached Exhibits or recordings are authentic, accurate and true.

Sworn before me, a Notary Public,

Amanda J. Stratton Date June 27, 2011 Seal

AMANDA J. STRATTON
Notary Public, Maine
My Commission Expires May 19, 2012

CERTIFICATE OF SERVICE

Defendant Glenn A. Baxter, P.E., K1MAN hereby certifies that a copy of this brief was mailed on 28 June 2011, postage prepaid, to Richard W. Murphy, 100 Middle Street East Tower, Portland, Maine 04101

(signed) 

Glenn A. Baxter, P.E., K1MAN