

# Business

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## Carr appeals court ruling on contract

He wants to work for radio station 'of his choice' while waiting

By Diedra Henderson

GLOBE STAFF

Talk show host Howie Carr yesterday appealed a judge's decision that blocks him from jumping to WTKK-FM and asked the state appeals court to allow him to work for "the broadcaster of his choice" while his case works its way through the courts.

The appeal asks that a single judge review decisions by Suffolk Superior Court Judge Allan van Gestel that effectively keep Carr under contract at WRKO-AM through 2012.

At issue are sections of the contract that Carr signed with WRKO parent company Entercom Boston that permitted the radio station to match job offers that Carr fielded from rivals. Carr's attorneys argue that the "right of first refusal" language in the contract that Carr signed poses post-employment restrictions that state legislators have attempted to outlaw.

Van Gestel ruled that Entercom had the right to match the offer that Carr received from WTKK because it did so

while the contract between Entercom and Carr was "still fully operative, albeit for only about two more months" and did not create a "post-employment restriction."

Andrew Botti, a Boston employment law attorney, said the legal argument made by Carr's team might gain traction with the appeals court. Entercom's right of first refusal language "has an anticompetitive effect," which runs afoul of state law, Botti said. "The appeals [court] is going to have to speak to this. The problem with this case . . . is there is not enough appellant law or precedent to guide us."

The appeal marked the latest twist in a lengthy legal battle that a review of court documents showed attorneys sought to avoid and that van Gestel said Carr could have sidestepped entirely.

It began when WTKK was wrestling with how to retain listeners loyal to Don Imus after he was fired from his nationally syndicated show for making racist remarks.

The station, owned by Greater Media Inc., hotly pursued their first choice, Mike Barnicle. On June 1, the same day that Barnicle turned down the job, the station reached out to Carr.

Phillip L. Redo, the Greater Boston Radio vice president responsible for recruiting and hiring talent, called Cary Pahigian, Carr's agent and a 26-year broadcasting industry acquaintance, about Carr's interest in the job.

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ANDREW BOTTI  
Employment-law attorney

Redo knew Entercom had not renewed Carr's contract, a move that would have boosted Carr's salary. "I understood that to mean that Mr. Carr would be available to work for another employer after the expiration of his agreement with Entercom on Sept. 19, 2007," Redo testified in a deposition.

"My interest was high and I was told that their interest was equally high, considering that it had been made known to me that [Carr] was interested in A, not staying with Entercom and, B, coming over to our station," Redo said in the deposition.

Carr's afternoon slot on WRKO, meanwhile, was dropping precipitously from 5th-ranked among adults 25 to 54 in the spring down to 14th by Arbitron's June 28 to Sept. 19 summer ratings period.

Within a month of their conversation, Greater Boston offered Carr a five-year contract worth up to \$6.75 million, contingent on Carr being legally able to go to the station after his contract expired.

The contract was contingent upon at least one of three things occurring: Entercom failing to match the offer; Entercom waiving its right to match the offer; or a

court declaring key sections of Carr's contract unenforceable.

Carr promptly filed suit, arguing provisions in his WRKO contract were illegal.

Entercom, owner of WRKO, responded by quickly matching the compensation offered by its rival and extending Carr's contract through 2012.

"Carr could have quietly, even secretly, met with Greater Boston Radio Inc. and discussed or negotiated his future with it while his Artist's Agreement was still operative," van Gestel wrote on Sept. 19, in an interim ruling.

"What Carr could not do is what he did here: receive and accept an offer from Greater Boston Radio Inc. before his Artist's Agreement had terminated."

The day Entercom was informed that Carr filed suit, Entercom's attorney, Shepard Davidson, urged Carr's attorney, Bret Cohen, to keep the matter out of court.

"[E]veryone at Entercom genuinely hopes that he will be excited about the fact that he now can remain with Entercom

under financial terms that he plainly feels are appropriate," Davidson wrote. "Likewise, my client hopes that Mr. Carr will recognize that the legal and practical advice he has received in connection with filing the lawsuit was ill-advised and will agree to dismiss the litigation — especially where Mr. Carr will be liable for Entercom's legal fees to the extent the litigation continues."

From the outset, van Gestel peppered legal opinions with personal commentary.

While deciding that Carr's contract with WRKO should not be shielded from public view, he noted "Carr touts himself as a fixture on local television and radio broadcasts for over 20 years." The judge added: "The Court judicially notices that Carr also is a frequent author of hypercritical screeds in the Boston Herald, attacking essentially any public figure of his choice."

In his final decision, van Gestel chided Carr for getting himself into a legal tangle.

"He could simply have waited until Sept. 20, 2007, by which time his Agreement with Entercom would have expired," van Gestel wrote in the seven-page ruling.

"Carr cannot now say that what he did had no legal effect. . . . And he cannot now twist the language of that Agreement to mean something that it does not."

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