Award No. 1715
Docket No. 1593
2-B&OCT-SMW-'53

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 130, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Sheet Metal Workers)

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, Sheet Metal Worker M. W. Guinn was unjustly dismissed from the service on June 27, 1952.

2. That, accordingly, the Carrier be ordered to restore this employe to service with his seniority rights unimpaired and with compensation for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: Sheet Metal Worker M. W. Guinn, hereinafter referred to as the claimant, was employed as such by the carrier on April 10, 1952, at the Lincoln Street Coach Yard, Chicago, Illinois, and was assigned from 8:00 A. M. to 4:00 P. M. daily, except Tuesdays and Wednesdays, which were his rest days. However, on June 27, 1952, the carrier's foreman elected to notify this claimant that his services were no longer required.

This dispute has been handled with the carrier in accordance with the controlling agreement effective September 1, 1926, as subsequently amended, with the result that the highest designated officer thereof to whom such disputes are subject to appeal, has declined to adjust it.

POSITION OF EMPLOYES: It is submitted that this claimant, by virtue of the service rendered as disclosed in the foregoing statement of facts, established employment relations with the carrier as well as property-seniority rights as a sheet metal worker, beginning on April 10, 1952, within the explicit terms of the revised Rule 22(a) captioned "Seniority".

Moreover, there is nothing contained in the provisions of the above seniority rule or in any other rule of the aforesaid controlling agreement which authorized the carrier on April 10, 1952, to employ this claimant as a temporary employe or without the right and protection of all terms of the collective bargaining applicable agreement rules made by and between the carrier and System Federation No. 130, in pursuance of the applicable provisions of the Railway Labor Act.

SUMMARY

The carrier asserts the following pertinent reasons why this Division cannot act or rule to uphold the petitioner's request:

(1) The working contract contemplates the status, probationary or otherwise, of an "applicant for employment."

(2) The working agreement contemplates that an employe must execute an application for employment.

(3) The standard employment application form petitioner executed made employment temporary pending approval.

(4) The standard employment application form petitioner executed required the certification of employment for five years past.

(5) The standard employment application form became a negotiated condition in the 1926 contract.

(6) Prior to 1926, during year 1926 and after the year 1926 up to the present time, the standard employment application form contained and has always contained the two basic requirements found in the 1947 application form: certification of employment for five years past and the stipulation that employment was temporary pending approval.

(7) The formal approval of the application is a condition precedent to acquiring vested seniority.

(8) The petitioner's application was rejected within a "reasonable" period of time.

(9) The carrier was not required to give the petitioner a hearing or an investigation under any rule or practice on this property.

(10) The petitioner's application was palpably falsified.

(11) The petitioner failed to establish he had the necessary four years' experience as a sheet metal worker.

Based on the above, the carrier respectfully requests this Division to find this claim and request as being without merit and to deny them accordingly.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The Sheet Metal Workers of System Federation No. 130 claim Sheet Metal Worker M. W. Guinn was unjustly dismissed from carrier's service on June 27, 1952. Because thereof they ask that he be restored to carrier's service with his seniority rights unimpaired and with compensation for all time lost because thereof.

On April 9, 1952 claimant sought employment with the carrier as a Sheet Metal Worker and for that purpose executed its application Form

726-Rev. This application form required furnishing certain information, which claimant did. On April 10, 1952 claimant started working at carrier's Lincoln Street Coach Yards, Chicago, Illinois. He continued to work until June 27, 1952. On that day carrier notified him his application for employment was unsatisfactory, not acceptable and therefore rejected. It is the Organization's thought that claimant had become an employe as of April 10, 1952, within the meaning of its agreement with the carrier, and therefore carrier was obligated to comply with the requirements of Rule 26 (c) of the parties' effective agreement before it could dismiss claimant from its services. It can be stated that if Rule 26 (c) is applicable that carrier did not fulfill the requirements thereof.

We have no right to determine whom the carrier shall employ and what employment policies or standards it may apply in doing so. Why it may reject an application for employment, in the first instance, is a matter of its own concern. However, after the applicant has become an employe and subject to the agreement, his discharge or dismissal is quite another matter. In the latter situation carrier must comply with the requirements of Rule 26 (c) and, at the hearing therein provided for, establish a good cause before it can do so. The question then is, did claimant ever obtain an employe status within the meaning of the parties' agreement, particularly Rules 22 (a) and 26 (c) thereof, as that is the status to which those rules have application?

Rule 1 of the parties' agreement provides carrier may require an applicant to fill out an application containing certain information. The application claimant filled out more than complied therewith. He was then put to work while the information he gave was being checked. While the agreement provides no period of time for this purpose numerous awards of the several divisions of the Adjustment Board have correctly held that, in the absence thereof, the carrier has a reasonable length of time for this purpose and, while doing so, the applicant is not considered an employe in the service of the carrier for the purposes of the agreement and can gain no rights thereunder. See Awards 3099, 5256, 10196, 12027 and 12029 of the First Division; 866 and 956 of this Division; and 3152 of the Third Division. Under the circumstances here we do not think carrier took an unreasonable length of time for that purpose. There was nothing improper in its rejection of the application.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1953.

DISSENT OF LABOR MEMBERS TO AWARD NO. 1715

The labor members have taken it to be settled since the United States Supreme Court handed down its decisions in **Order of R. Telegraphers v. Railway Express Agency**, 321 U.S. 342, and **J. I. Case Co. v. National Labor Relations Board**, 321 U.S. 332, that the collective agreement is controlling on the matters of rates of pay, rules, and working conditions and that individual agreements between an employe and a carrier at variance with the collective agreement must fall. Today, however, the majority of this Division have upheld a private agreement between an employe and a carrier which makes

the employe not an employe and thereby deprives him of the benefit of the rules of the collective agreement negotiated for the protection of employes, particularly Rule 26(c) relating to discipline.

That Sheet Metal Worker Guinn was in the employ of the carrier from April 10, 1952, until June 27, 1952, is a fact beyond doubt. He rendered to the carrier valuable services and in return therefor received compensation at the same rate as other employes in his job classification. If he was not a bona fide employe of the carrier, he must have been a trespasser on the property or a guest performing gratuitous services; and he obviously was neither of these. Notwithstanding this, the majority herein term Sheet Metal Worker Guinn an "applicant for employment" which they distinguish from an "employe" and conclude he is not entitled to a hearing as called for by Rule 26(c) of the applicable agreement.

Distinctions based on nomenclature alone are not distinctions of substance. The applicable collective agreement does **not** provide for two classifications of employes, one composed of "regular" employes who are subject to all rules and one composed of "temporary" employes who are not. Under the agreement in question, a person employed by the carrier is an "employe" for all intents and purposes.

An "applicant for employment", unless the term is specially defined in the agreement, is a person who applies for a job. He may be "hired" by the employer in one of two ways: by formally accepting him as an employe or by putting him to work. Either way is equally effective. Can an employer verbally reject an applicant's offer to work but yet direct him to report for work at a particular place and deny that he hired him or that he is his employe? Obviously not, for the employer's actions would have belied his words.

The carrier herein induced the employe to sign a private agreement that his employment was to be temporary. Such agreement was an attempt to make him a "temporary employe", a classification inconsistent with the provisions of the applicable collective agreement whereby persons employed are no more and no less than "employes". The carrier in its submission carefully refrains from referring to Sheet Metal Worker Guinn as a "temporary employe" but rather designates him as a mere "applicant for employment". This designation is not only artificial; it is untrue. From the moment he started to work, he was obviously more than an "applicant for employment"; he was some sort of an employe, and as has been noted, the applicable collective agreement contemplates only one sort of employe.

Sheet Metal Worker Guinn is simply an employe of the carrier whose rights under the applicable collective agreement have been curtailed by virtue of a private agreement with the carrier. We dissent from the decision of the majority who herein uphold this illegal private agreement.

R. W. Blake

A. C. Bowen

T. E. Losey

Edward W. Wiesner

George Wright