

Award No. 16838
Docket No. CL-16879

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYES**

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6167) that:

(A) Carrier violated rules of the Clerks' Working Conditions Agreement and the Union Shop Agreement signed February 4, 1953, when on October 9, 1965, at Cedar Rapids, Iowa, it reemployed G. J. Fogarty, whose service with the Carrier has been terminated August 31, 1965, for his failure to comply with the Union Shop Agreement.

(B) D. L. Freeman be compensated a day's pay at the time and one-half rate attaching his position (\$34.21 per day) on October 9, 10, 16, 17, 23, 24, 30, 31, November 6 and 7, 1965, and a like amount on each Saturday and Sunday thereafter that G. J. Fogarty is permitted or required to perform rest day relief service on D. L. Freeman's position.

(C) G. J. Fogarty's employment relationship with the Carrier be terminated.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties as referred to herein are on file with the Board and by this reference thereto are made a part hereof.

D. L. Freeman is regularly assigned to the Rate Clerk-Chief Clerk position, rate \$22.81 per day, Monday through Friday, rest days Saturday and Sunday at Cedar Rapids, Iowa.

G. J. Fogarty, a student at the University of Iowa was employed by Carrier on an unknown date during 1964.

May 17, 1965, the Brotherhood's General Secretary-Treasurer E. H. Johnson notified Local Lodge Secretary-Treasurer J. D. Evert that Fogarty had performed sufficient service to require his applying for membership in the Brotherhood as provided in the February 4, 1953 Agreement and suggested

The claim of the Clerks for Fogarty's dismissal was declined by the company, appealed and discussed on the property without agreement, and finally progressed to this Board. The contract which is relevant herein is by reference made a part of the record in this dispute.

II. THE ISSUE

The issue in this case is plain. It is whether the company has the right to reemploy individuals once discharged under the terms of the Union Shop Agreement. However, there is a subtle related question also involved in this case. And that is whether the union has the right to dictate employment practices to the railroad because it once required expulsion of the employee.

The union in this dispute argues that the existing union security agreement forever bars a once dismissed employee from employment as a clerk. The union also claims that because the subject employee is a university student, he is not a "bona fide" employee.

In answer, the company contends:

(1) that the words "continuous employment" as used in the Union Shop Agreement refer only to the act of retaining employment and not to the act of obtaining employment;

(2) that in line with the major purpose of the Union Shop Agreement, awards in various arbitration cases, and the facts sympathetic to the employee in this case, permanent dismissal is unjust and unreasonable;

(3) that collegiate status in no way affects or invalidates the individual's standing as a good faith employee of the Carrier.

OPINION OF BOARD: On June 2, 1964, G. J. Fogarty was employed by Carrier as an extra clerk. He had had some previous service with Carrier in 1960 to 1963 which is not relevant to the issues in this case.

By July 11, 1964, Fogarty had performed compensated service on thirty days; and, by August 1, 1964, he had been in Carrier's employ for sixty calendar days from the date he first performed compensated service. On August 31, 1965, Carrier, acting on citation by Clerks, terminated Fogarty's employment because of his failure to comply with the Union Shop Agreement, dated February 4, 1953, to which it and Clerks are parties. The pertinent provision of the Agreement reads:

"SECTION 1.

In accordance with and subject to the terms and conditions hereinafter set forth, all employees of the Carrier now or hereafter subject to the Rules and Working Conditions Agreements between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization; except that such membership shall not be required

of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreements."

On October 9, 1965 — approximately six weeks after termination of Fogarty's employment pursuant to the Union Shop Agreement — he was "rehired" by Carrier, it says as a new employee, extra clerk, with new seniority date as of the date of the re-employment.

The issue is whether Carrier was free to re-employ Fogarty in the absence of proof that he had satisfied his contractual obligations under the Union Shop Agreement. Otherwise stated, are the time limitations of that Agreement in conjunction with Clerks' Rules and Working Conditions Agreement definitive as to all his employment on work under the Clerks' Agreement; or, upon breaks in his employer-employee relationship does he have, upon re-employment to work under the Agreement, on each occasion, repetitive time limitations prescribed in the Union Shop Agreement within which to comply with its terms.

The resolution of the issue is made plain in the language of the Union Shop Agreement which mandates that:

"... all employees of the Carrier now or hereafter subject to the Rules and Working Conditions Agreements between the parties hereto ... shall, as a condition of their continued employment subject to such agreements, become members of the organizations parties to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization ..." (Emphasis ours.)

We find that an employee that has worked under the Union Shop Agreement subject to the Rules and Working Conditions Agreement between Carrier and Clerks for the periods prescribed in the Union Shop Agreement must, as a condition of further employment on work covered by Clerks' Agreement, be in compliance with the obligations imposed on him by the Union Shop Agreement. Carrier, consequently, may not rehire an employee whose service it has terminated for failure to comply with the Union Shop Agreement and treat him as a stranger to that Agreement.

We hold that Carrier was contractually barred from reemploying Fogarty to perform work covered by the Clerks' Agreement, after it had terminated his employment for failure to comply with the Union Shop Agreement, in the absence of proof that at the time of his rehire he was in compliance with his obligations under that Agreement.

Rule 37(f) of the Rules and Working Conditions Agreement between Clerks and Carrier reads:

"Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee." (Emphasis ours.)

The Claim is that Fogarty, after his rehire on October 9, 1965, performed rest day relief on Claimant's position on dates set forth in paragraph (B) of the Claim; and, it is prayed that Claimant be paid at the time and one-half rate for those days "and a like amount on each Saturday and Sunday thereafter that G. J. Fogarty is permitted or required to perform rest day relief service on D. L. Freeman's position."

Since we found, *supra*, that Fogarty was wrongfully re-employed to perform work covered by Clerks' Agreement it follows that Fogarty was not "an available extra or unassigned employee" within the contemplation of Rule 37(f). Therefore, since the work was not performed "by an available extra or unassigned employee" the right to the work was contractually vested in the regular employee, Claimant herein. We will sustain paragraph (A) and (B) of the Claim. As to Paragraph (C) of the Claim Carrier may not assign Fogarty to work covered by the Clerks' Agreement unless and until he is in compliance with the Union Shop Agreement.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained to the extent set forth in Opinion, *supra*.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1968.