



Award Number 17974

Docket Number TE-18072

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union and the Texas and Pacific Railway Company, that:

1. Carrier violated the Agreement when it caused, required or permitted Mr. S. E. Pickett to work positions covered by the scope of the Telegraphers' Agreement.
2. Carrier shall compensate each and every telegrapher relieved by Mr. Pickett for eight hours pay at the applicable rate on each and every day Mr. Pickett is allowed to work, retroactive sixty days from the date of this claim and continuing on a daily basis thereafter until the violation shall have been corrected.

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

S. E. Pickett was an employee under the Agreement who was dismissed from the service on December 23, 1966 for violation of the provisions of the Union Shop Agreement. By the Carrier's own admission, they continued the employment of S. E. Pickett during the year 1967 for a period of 193 days. The Carrier claimed the right to hire S. E. Pickett as a new employee beginning work on February 1, 1967. Claim was filed for the violation of the Agreement when S. E. Pickett was continued in his employment and permitted to work positions covered by the scope of the Telegraphers' Agreement and claim was made for each and every telegrapher relieved by Mr. Pickett for eight hours' pay at the applicable rate of each and every day Mr. Pickett was allowed to work.

(b) ISSUES

Did the Carrier violate the Agreement by continuing the employment of S. E. Pickett as a telegrapher and permitting him to work positions within the scope of this Agreement?

Damages for the breach.

(c) FACTS

S. E. Pickett was first employed by the Carrier in December, 1960 and became a member of the Organization in accordance with the Union Shop on January 31, 1961. He continued to work as a telegrapher until he was dis-

to Superintendent L. H. Miller and General Manager J. C. Love in light of Awards 9916 and 10649 of the Third Division, National Railroad Adjustment Board, but do not agree with your position that the Carrier is precluded or prohibited from a bona fide employment of a qualified telegrapher as was done here merely because his services had previously been terminated by reason of his failure to comply with the provisions of the Union Shop Agreement.

Certainly we are continuously called upon to grant requests for the reinstatement of employees who have been dismissed from Carrier's service for just cause in the administration of discipline and we long ago learned to temper justice with mercy.

In view of Carrier's disciplinary policy and the frequent reinstatement of employees who have been dismissed from Carrier's service for cause when it is believed that discipline has served its purpose, we cannot grasp your position in connection with our action in employing Mr. S. E. Pickett as a telegrapher effective February 1, 1967, merely because of his previous failure to comply with the provisions of the Union Shop Agreement. Certainly there is no provision contained in said Agreement, nor in the legislative history preceding the amendment of the Railway Labor Act which removed the prohibition against Union Shop Agreements to support your contention that the Carrier is prohibited from employing Mr. Pickett under the facts present here.

Notwithstanding the foregoing, no valid claim has been presented in paragraph 2 of your 'Statement of Claim' as required by Article V of the National NonOp Agreement of August 21, 1954, for the reason that no claimant has been named nor readily identifiable, and the date said claim commenced or ends has not been specified.

Accordingly, we must advise you that no valid claim has been presented, and without waiving this procedural defect for the reasons fully set forth above there is no basis for your complaint and/or 'claim,' which is hereby declined.

Yours truly,
/s/ O. B. SAYERS"
O. B. Sayers"

The claim was not composed on the property and has been progressed to your Board.

OPINION OF BOARD: S. E. Pickett was employed by Carrier as a Telegraph Operator on October 17, 1960. His employment was terminated December 23, 1966, pursuant to Section 5 of the Union Shop Agreement. Pickett, thereafter, made application to Carrier, dated January 10, 1967, for employment as a Telegrapher. He was hired, in response to said application, on February 1, 1967—Carrier says "as a new employee without any preexisting right or privileges."

Carrier admits that Pickett has been assigned to Telegraphers' work since February 1, 1967. Petitioner filed Claim, as set forth in Statement of Claim, *supra*, on November 8, 1967.

It is Petitioner's position that Pickett having been discharged for failure

to comply with the Union Shop Agreement he was not thereafter eligible for reemployment by Carrier as a Telegrapher.

It is Carrier's position that it was "not precluded or prohibited from a bona fide employment of a qualified telegrapher (Pickett) as was done here merely because his service had previously been terminated by reason of his failure to comply with the provisions of the Union shop Agreement."

Resolution of the issue is pivoted on interpretation and application of Section 2. Eleventh. of the Railway Labor Act, as amended, particularly the following provisions:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted —

(a) To make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. (Emphasis supplied.)

(b) To make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner."

It is uncontroverted that: (1) Picket did not tender to Petitioner, at any time, the periodic dues, initiation fees and assessments which were contractually due to Petitioner and was the cause of his discharge, on December 23, 1966, for violation of the Union Shop Agreement; (2) Pickett made any tender of periodic dues, initiation fees and assessments to Petitioner after his reemployment as a Telegrapher on February 1, 1967; or, made any arrangements to have same paid as provided in Section 2. Eleventh (b) of the Act, *supra*.

In its Submission Carrier quotes from an alleged letter from the Gen-

eral Chairman to Petitioner's General Secretary and Treasurer and its District Chairman:

"It is the intention of this Organization to have Mr. Pickett's present employment with this Carrier terminated, therefore, by copy of this letter, I am instructing GS&T Vernon Wester to return to Mr. Pickett any money which he may send to him. This will likewise apply to any District Chairman."

While the quotation, as it stands in the record, has no evidentiary value, we will assume, *arguendo*, that the letter was in fact written. However, it is not a defense for failure to comply with the Act. The statutory duty "to tender" is vested in the individual employee. Pickett made no tender at anytime; ergo, he was not statutorily eligible for continued employment as a telegrapher.

Carrier's defense that it was free to hire Pickett "as a new employee" on February 1, 1967, is a ruse which if accepted as a premise would permit continued employment of an employee, and permit the employee, in conspiracy with Carrier, to evade the Union Shop Agreement. For example, an employee could be discharged on one day for failure to comply with the Union Shop Agreement — rehired as a new employee by Carrier on the following day — and — this procedure could be, relative to the same employee, continued ad infinitum. That such would be contrary to the legislative intent is obvious.

An employee holding a position which comes under a Union Shop Agreement is personally charged with compliance with its terms. Insofar as such an Agreement is concerned the employee holds the keys to the door of his continuing employment eligibility. See and compare our Awards 9916, 10649, 16868.

There are ways that Pickett can reestablish his eligibility for reemployment as a Telegrapher by Carrier. But, it is not the function of this Board to give such advice. Our jurisdiction is limited to interpretation and application of the Union Shop Agreement and the Railway Labor Act, in the light of the facts of record in a particular dispute properly before us.

Carrier avers that: (1) the Claim is not valid for the reason that no claimant has been named or is readily identified as required by Article V of the August 21, 1954 Agreement; and (2) the date said Claim commences and ends has not been specified.

Carrier has shown on page 3 of its Submission (Record p. 35) that its records show the dates that Pickett relieved a telegrapher. Certainly, the records must show the position on which Pickett relieved on each particular day that he worked as a Telegrapher since February 1, 1967. Therefore, the Claimants within the contemplation of paragraph 2 of the Claim are readily identifiable and Article V is satisfied in that regard.

Since this is a continuing Claim the August 21, 1954 Agreement is satisfied by the period prescribed in paragraph 2: "retroactive sixty days from the date of this claim and continuing on a daily basis thereafter until the violation shall have been corrected." (Emphasis supplied.) This is legal certainty.

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;