

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35450
Docket No. CL-35671
01-3-99-3-564**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the System Committee of the (GL-12423) Organization that:

- (a) This Claim is tiled on behalf of Ms. Kelly Dasilva, Clerk, Amtrak, Boston, Massachusetts. The Claim is for eight (8) hours at the rate of time and one half, and commences October 8, 1997. This Claim is a continous one for each day position SEC-1 works at South Station, Boston, Massachusetts, until the violation is corrected.**
- (b) The Carrier violated the Agreement when it put position SEC-1 up for bid, the position went no bid, and the company was to hire a new employee from the street. However, instead of hiring a new employee from the street, the Carrier hired a non-union temp., Mr. Nyles O’Brien, and used his services to till the position.**
- (c) The rules violated are Rule 1, Rule 2A-1, 2A-5, 2B-1, Appendix B, Section 9, Section 6, and all other rules of this Agreement.**
- (d) This claim is valid and must be paid.”**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute were given due notice of hearing thereon.

The position of Secretary to General Manager Commuter Rail Services (SEC-I) became vacant at Amtrak's South Station in Boston, Massachusetts. The Carrier posted a bulletin advertising the position on at least two occasions, but received no bids. Then on October 8, 1997, Mr. Nyles O'Brien was hired from a temporary employment agency to fill the vacancy while the Carrier sought a permanent and qualified applicant. Mr. O'Brien's employment expired on December 22, 1997, approximately ten weeks later.

By letters dated November 20, 1997, the Organization filed claims on the behalf of ten claimants who were all assigned to TCU clerical positions in the Boston, Massachusetts, area. The claims alleged violation of the following areas of the current Agreement:

5. Rule 1- Scope
6. Rule 2A-1- Bulletining & Awarding of Positions
7. Rule 2A-5- Time in which to Qualify
8. Rule 2B-1- Seniority Date

The Organization asserts that the hiring of a temporary employee from an outside agency violated the Rules stated above. It contends that a TCU Clerk should have been offered the opportunity to qualify for the position or a full-time permanent employee should have been sought from the outside. To support its claim, the Organization cites Rule I- Scope. Section (d) of that provision reads as follows:

“(d) When a reduction in force occurs which affects employees covered by this Agreement, the remaining work shall be performed by employees covered by the Agreement.”

In addition, the Organization cites Rule 2A-1, Bulletining and Awarding of Positions. Section (a) of that provision reads as follows:

“(a) All new positions and vacant positions known to be of more than thirty (30) days duration will be bulletined on the Wednesday following the date they occur, but not later than the succeeding Wednesday, in the seniority district, for a period of seven (7) calendar days in places accessible to employees affected. Bulletin will show position (indicating if new), location, primary duties, tour of duty, meal period, days of rest, rate of pay, symbol number, if numbered, and whether position is of a permanent or temporary nature.”

The Organization further contends that Rule 2A-1 requires re-bulletining and temporary assignment of a lesser-qualified TCU Clerk. This idea is further expanded in Rule 2A-5, which offers the opportunity for the employee to demonstrate ability in the new position. The Carrier blatantly disregarded both these areas of the Agreement, in the Organization’s opinion.

The Carrier denies that any violation has occurred in this case. It holds that Amtrak attempted to fill the secretarial vacancy, but that no TCU clerical employee bid on it. The position is critical, requiring direct accountability to the Manager and significant steno and typing skills. The Carrier asserts that none of the Claimants in this case met the qualifications for the position. Furthermore, the Carrier notes that this is a “must fill” position, and when no bids were offered, Amtrak used temporary help from an outside firm until a qualified employee could be hired, as it has done on many previous occasions.

In direct rebuttal to the Organization’s allegations, the Carrier insists that Rule 2A-1 was not violated, because the vacancy was advertised at least two times without a single bid. Rule 2A-5, outlines the time frame for an employee to qualify in a vacant position. The Carrier contends that it is impossible for this Rule to have been violated, since none of the Claimants applied for the position. In response to the alleged violation of Rule 2B-1, establishment of seniority, the Carrier states that it fails to see the pertinence of that Rule, since all the Claimants had previously established clerical seniority in the TCU craft.

Finally, Rule 1 - Scope, is central to the Carrier's defense. Public Law Board No. 2792, Award 1 set forth the guidelines for the evaluation of the Scope Rule. That case also involved Amtrak and the TCU.

In that Award, the Board stated:

"As the moving party in this Scope Rule the Organization has the burden of proving 1) the reservation of the work to Clerk-Stenographers by literal and unambiguous contract language, or 2) the mutual intent or implicit understanding of the parties to the agreement that, notwithstanding contractual silence or ambiguity, the work at issue should be reserved for Clerk-Stenographers covered by the Agreement. The former burden is met by the Organization if it can point to clear, specific and unambiguous contract language. With respect to the latter burden, it has been established by a long line of precedent, which we are not at liberty to ignore, that the Organization must demonstrate by a preponderance of evidence the existence of a long-standing, mutually acknowledged and uniform practice of assignment to and performance of the disputed work by the Agreement-covered employees, to the practical exclusion of all strangers to the Agreement."

The Carrier asserts that this Scope Rule in this case is general in nature because it does not specifically reserve the disputed work to any particular craft or employee class. It maintains that the current Agreement does not meet the standard set forth requiring unambiguous contract language assigning the disputed work to the TCU craft. Therefore, the Carrier contends, the burden of persuasion falls on the Organization to show that historically the disputed work has been given to TCU Clerks in similar situations on a system-wide basis. The Carrier proposes that the Organization has failed to meet its burden of persuasion by offering no evidence of the specific nature, times, and amounts of removal of duty. In the Carrier's view, the Board has no factual evidence to consider. The Claimants did not prove that they lost any compensation or that they would have been able to work on any of the dates in question. By contrast, Amtrak points out that it has offered a past record of hiring temporary employees since 1989 when other positions went no bid in the Boston area. The Carrier asserts that it has contracted out quite frequently on a system-wide basis as is their right under the Rail Passengers Services Act and as has been upheld in multiple Arbitration decisions.

The Board agrees that the Scope Rule in this case is general in nature requiring the Claimants to offer persuasive proof of past practice. The Claimants have offered no such evidence. In fact, Amtrak has demonstrated a frequent record of hiring temporary help in similar situations. The Carrier met its contractual obligation to post the vacancy multiple times. The Claimants had full opportunity to apply for the position, but chose not to exercise their right. Since no bids were made, Amtrak, in accordance with past practice hired an outside temporary employee until a qualified permanent employee could be found. Accordingly, the Board has no choice but to deny this claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of April, 2001.