NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24135
THIRD DIVISION Docket Number CL-23457

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Belt Railway Company of Chicago

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9263) that:

1. Carrier violated the effective Clerks' Agreement when it employed Ms. J. Heater on a clerical position without permitting her to establish seniority and under conditions not in conformity with the provisions of the collective bargaining agreement.

2. Carrier shall now place Ms. Heater on the clerical seniority roster with a seniority date of May 7, 1979; shall compensate her for the difference between what she received and the rate of Position No. 541 for service performed from May 7, 1979 through June 1, 1979, shall compensate her for any and all work to which she would have been entitled by virtue of her seniority which was performed by a junior employe or a non-employe commencing on June 2, 1979 and continuing each and every day thereafter that a like violation occurs.

OPINION OF BOARD: In this dispute, a temporary position existed due to an incumbent going on a maternity leave of absence. The record indicates that there were no furloughed or extra employes at the time and that the maternity leave of absence was expected to last less than sixty (60) days. Further, the Carrier insists that there were no employes available or willing to perform the work of the temporary position on an overtime basis.

When no one bid the position, the Carrier employed the services of the Claimant, who was an employe of Stiver's Temporary Personnel, Inc. She was not afforded a seniority date nor, according to the Organization, was she paid the rate of pay established for the position she filled and she did not receive any contractual benefits. The provisions of Rule 19 were complied with in an attempt to fill the position however it remained open and the Carrier then applied Rule 10, which states that in the event no applications are received from employes in service covered by the Agreement Rules, and Rule 19 has been complied with the position may be filled by an individual not covered by the Agreement. The Organization does not deny that the Carrier had the right to fill the position under Rule 10 however the Organization states that once the position is filled by someone not covered by the Agreement that person becomes a new employe and the provisions of the Agreement apply.

The Carrier states that Rule 10 is clear and unambiguous and all that it states is that if the Carrier is unable to fill a position under the terms of the Agreement the Carrier may use any individual - whether such individual is a Supervisor, an employe of another craft, or - as here - a non-employe furnished on a temporary basis.

In a September 25, 1979 denial of the claim, the Carrier's Director of Labor Relations and Personnel stated to the Organization that employes of the temporary personnel agency involved have been used for "...many years on this property in situations such as here where there are no furloughed or regular employes available to work a temporary vacancy."

Although some seven (7) months passed before the matter was submitted to this Board in a letter stating intention to file an ex parte submission, the Board finds no rebuttal to that assertion. It may very well be the case, as cited by the Organization, that it is not enough that a party merely assert past practice but it must actually be proved (Third Division Award No. 19647); nonetheless it would seem that a party has some obligation to dispute the existence of a practice if in fact one is alleged.

But in any event, we feel that Third Division Award No. 23562 is pertinent to the dispute. Although a different type of claim was presented to the Board in that case nonetheless the Referee, in a dispute between these same parties concerning a temporary employe hired from an employment service agency stated that there was Schedule support for hiring a temporary employe under the facts of that case. In the penultimate paragraph the Board stated in Award No. 23562 that the Carrier had the right under Rule 10 to hire "...on a temporary basis an employe not covered by the Agreement." As we read the Agreement as a whole and the prior Award we do not conclude that the Referee in the cited case suggested that the temporary employe became an "employee" under the terms of the Agreement to the extent that the Organization asserts in this case.

We have also considered the Decision of the Arbitrator in Award No. 1 of Public Law Board No. 119 however we do not feel that the same contractual language or the same facts of record exist there so as to make that Award controlling in contemplation of the prior Award on this property.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of January 1983.

LABOR MEMBER'S DISSENT
TO AWARD 24135, DOCKET CL-23457
(Referee J. Sickles)

Award 24135 is palpably erroneous. The Award avoids deciding the claim submitted through the cute trick of fashioning a different dispute and then resolving this different dispute to its own pleasing. One need only look at the statement of claim to appreciate this fact.

What the dispute involved and what the statement of claim sought was the payment at the rate of Position No. 541 for the "employe" used to fill the position during the regular incumbent's maternity leave. The facts were not disputed. Attempts to fill the vacancy bottomed out and Rule 10 became involved. Rule 10 reads:

> "Bulletined positions may be filled temporarily pending assignment. In the event no applications are received from employees in service covered by these rules, and Rule 19 has been complied with, the position may be filled by an individual not covered by this Agreement."
>
> (Emphasis added)

Under the clear language the vacancy can then be filled by someone (an individual) not covered by the agreement. But once such an individual commences work on the position he becomes an employe subject to the agreement and all provisions of the agreement apply. It is gross stupidity to suggest any other result. In normal times, each work day, scores of vacancies under clerical agreements on all U.S. Carriers which have a similar rule go no bid and are eventually filled by individuals not covered by the agreement.

Such individuals are, none-the-less paid the rate of pay provided by the agreement. They establish seniority as provided by the agreement. They receive the fringe benefits negotiated for all employes subject to the agreement and their wages are subject to the Railroad Retirement Taxing Act and the Railroad Unemployment Insurance Act. Any other result would mean that eventually, through attrition, all employes could be removed from agreement coverage.

Additionally, the Railway Labor Act clearly defines "employe" and the law makes no distinction between individuals hired on a permanent basis or those hired on a temporary basis. Moreover, the source from which an individual becomes an employe, family referral, Railroad Retirement Board placement services, want ads, or temporary personnel agencies, etc., is not remarkable. When hired, regardless of source, an individual becomes an employe subject to the Act and subject to the agreement. Thus, to now suggest that a "temporary employe" does not become an "employe" solely because the individual was recruited through temporary employment service is ludicrous.

The absence of logic in the Award, its faulty premises and its obviously defective conclusion will demonstrate clearly its incompetence.

J. C. Fletcher, Labor Member

Date: 2-15-83