

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Green Bay and Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10416) that:

(1) Carrier violated the provisions of the current Agreement, particularly Rules 1, 11 and 73 when on December 12, 13, 14, 15, 16 and 19, 1988, it hired the services of a temporary employment service, Kelly Services, to perform the work of a position in the Accounting Office of the Carrier, and

(2) Carrier shall now be required to pay Ms. Jean Patenaude forty-eight (48) hours at the rate of \$18.92 per hour for the dates as indicated above."

FINDINGS:

The Third 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 employes 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 waived right of appearance at hearing thereon.

This dispute focuses on a unique set of circumstances on a small Carrier. During the year 1988, one of the three employees in the Data Processing Department was faced with the terminal illness of her husband. As a consequence, she was off from work for approximately 7 1/2 weeks during the year. Her husband died on December 10, 1988, and she was on bereavement leave for December 12, 13, 14. The Carrier determined that it needed extra help for year end work in the Department, in view of the extensive time lost and because of such hired a Kelly Temporary employee to start on December 12th. That temporary employee worked on the six days indicated in the Claim until a call was received by Carrier from the Organization protesting the use of an outside contract employee for the work in question. Upon receipt of the call Carrier terminated the Kelly girl and called the absent employee back to work. The record also indicates that all employees were working during the six days and suffered no losses whatever from this assignment to an outsider. The Agreement in this dispute contains a 'positions or work' Scope Rule.

The Organization insists that Carrier had no right to contract out work covered by the Scope Rule as it did in this instance. Furthermore Rule 11 provides for the filling of short vacancies. In fact, the Organization insists, seniority, fitness and ability are the only considerations in the filling of such vacancies. It is argued that Carrier had no right to ignore the Agreement, regardless of its motivations. Furthermore, Claimant was available to perform the work on an overtime basis and suffered a loss of work opportunity.

Carrier states that there were no employees in the unit available to perform the work and it would have been ridiculous to hire a new employee for these purposes and only have to terminate such an individual shortly thereafter. Under the unique circumstances Carrier believes that no rules were in fact violated since it could see no difference in using temporary employees or hiring a new employee and terminating such employee before the probationary period ended. Further, Claimant herein was fully employed on the Claim dates at a higher rate of pay.

While the Board understands and sympathizes with the Carrier in its actions, we cannot condone violations of the Agreement. Here there is no question but that the contracting of regular unit work was a violation of the 'positions or work' Scope Rule which was in force on this property. As we said in Third Division Award 21933 (and a host of other Awards): "Under the cited 'positions or work' scope rule, all work performed under the Agreement is preserved to the Organization until it is negotiated out."

With respect to the Carrier's position that the Claimant herein was fully employed and suffered no loss, we cannot agree with the conclusion that this invalidates the Claim. This issue was addressed in numerous Awards and by the Fourth Circuit Court of Appeals. As we held in Third Division Award 16009:

"The most judicial pronouncement on the issue of damages for contract violations where no actual losses were alleged or shown and the controlling agreement contains no penalty provisions is found in *Brotherhood of Railroad Signalmen of America v. Southern Railway Company*, a corporation --- F. 2d --- (C. A. 4, decided May 1, 1967). Therein, the court disavowed the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings and stated that this Board is not precluded from granting compensation for the loss of opportunities of earnings resulting from the contracting out of work under circumstances similar to those found in this dispute. We find the Fourth Circuit decision applicable in this case and will sustain the claim with certain modifications."

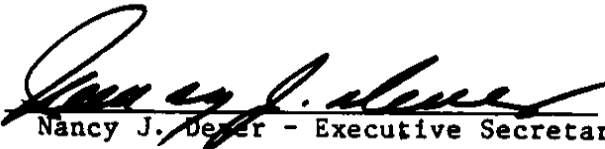
As a final note, the Board, while sustaining the claim, cannot award penalty pay. Only straight time pay is applicable as compensation for time not worked. Claimant will be allowed 48 hours at the pro rata rate for violation of the Agreement.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1991.