

BEFORE
PUBLIC LAW BOARD NO. 119

AWARD NO. 1
(Case No. 1)

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

and

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

STATEMENT OF CLAIM:

1. Carrier violated the provisions of the effective Clerks' Agreement when it used Judy Atkins to fill the position of Steno-Clerk in the Superintendent's Office at Toledo, (Lang Yard), Ohio and failed and refused to place her name on the Clerks' Seniority Roster, and failed to pay her the rate of pay established for that position.

(a) Carrier shall be required to place the name of Judy Atkins on the Seniority Roster - Clerical, Office and Storehouse Employees, with a seniority date of July 12, 1965, and she shall be given all benefits rightfully due her under the provisions of the rules Agreement in effect between the parties.

(b) Carrier shall be required to pay Judy Atkins the difference in the rate of pay between what she received and the established rate of pay for the position of Steno-Clerk in the Superintendent's Office at Toledo (Lang Yard), Ohio, commencing July 12, 1965 and for each and every day thereafter until the violation is corrected.

2. Carrier further violated the provisions of the effective Clerks' Agreement when it arbitrarily and capriciously dismissed Judy Atkins from its service on December 10, 1965 without the benefit of an investigation and hearing.

(a) Carrier shall be required to pay Judy Atkins a day's pay at the pro rata rate of the position of Steno-Clerk in the Superintendent's Office at Toledo (Lang Yard), Ohio, adjusted to include all subsequent general wage increases, for December 13, 1965 and for each and every day thereafter Monday through Friday, that she is withheld from Carrier service.

JURISDICTION:

This Board (Public Law Board No. 119) was duly established by Agreement of the parties, dated November 14, 1967, as provided for in Public Law 89-456 (80 Stat. 208) and in compliance with Regulations promulgated by the National Mediation Board by authority of said statute (F. R. Doc. 66-12451). The forementioned Agreement is incorporated herein by reference thereto.

The "Award No. " in the caption of this and all subsequent cases within the jurisdiction of this Board represents the order of the issuance of the award; the "Case No. " which appears in parenthesis under the "Award No. " identifies the case as listed in Appendix "A" of the November 14, 1967 Agreement.

The Rules Agreement which this Board has been petitioned to interpret and apply in resolution of the issues presented in the disputes within its jurisdiction is that one between the parties effective January 1, 1960, as amended by Memorandum of Agreement between the parties executed August 5, 1964.

OPINION OF BOARD:

I. THE FACTS

The facts in this case are not in dispute.

Carrier bulletined the position of Secretary in the Superintendent's Office, Toledo, Ohio. No bids were received from qualified employes. Carrier, without obtaining agreement of Clerks, entered into an arrangement with Kelly Girl Services, Incorporated, to assign one of its employes to perform the work of the position. Kelly assigned Miss Judy Atkins, Claimant herein. She first reported to Carrier's offices at Toledo, Ohio on July 13, 1965. From that date through December 10, 1965, Claimant performed the work of the position subject to Carrier's continuing authority to supervise and direct the manner of rendition of her services. On the latter date Carrier hired an employe to fill the position and advised Kelly that the contract for Claimant's services was being terminated.

In its Submission Carrier states that it "does not deny that the work performed by Miss Atkins was work formerly performed by clerical employees represented by the Organization and falling within the scope of the contract between the parties to this dispute." Further, Carrier stipulated that the position worked by Claimant is fully covered by the Agreement.

II. THE DISPUTE

Under date of September 12, 1965, Clerks wrote to Carrier's Superintendent:

"We submit this claim in behalf of Clerk Judy Atkins, for the difference in the rate of pay of the Stenographer and the rate of pay of which she has been receiving since being employed by this carrier.

Miss Atkins having been an employe of this carrier since July 12, 1965, more than sixty days should be assigned to the Stenographer position of which has yet to be assigned to someone.

We propose that this employe be given her seniority from the first day she was hired and that she be given all the benefits rightfully due her as an employe such as; the Insurance Benefits, the days worked will be counted towards her vacations etc."

Under date of December 15, 1965 - after Claimant's services were terminated - Clerks filed another claim with the Superintendent:

"On Friday, December 10, 1965, Clerk Judy Atkins, was advised by you that at the end of her tour of duty she was dismissed from the service of the carrier as her services were no longer required.

We must inform you that this is in violation of the Rules of the Agreement which provide that when an employe has been in the service for 60 days they cannot be dismissed without a hearing.

Therefore: we file claim in behalf of Clerk Judy Atkins, for Monday, Dec. 13th, and each every day that she is kept out of service, at the rate of the Steno., position of which she held."

Carrier's highest officer denied the December 10, 1965 claim, supra, for the given reasons:

"Miss Atkins is employed by the Kelly Girl Service, and has been working at Toledo because of contract arrangements made with that concern.

Miss Atkins has never been, at any time, an employe of the Detroit and Toledo Shore Line Railroad Company, and a submission of a claim in her behalf is improper and lacking in support of schedule rules and/or agreements. We find no provisions in any of the agreements in effect on this Carrier and your Organization which would give any support of the contention as set forth in your November 1, 1965 letter, and on this basis the claim submitted is declined."

He denied the December 15, 1965 claim, supra, for the given reasons:

"As stated in my letter of December 10, 1965, Miss Atkins was employed by the Kelly Girl Service and was working on the Shore Line because of contract arrangements made with that concern, and has never been at any time, an employe of the Detroit and Toledo Shore Line Railroad Company.

Miss Atkins not being an employe of the railroad company is not subject to the rules governing such employes. When the need for the Kelly Girl Services ceased to exist this concern was notified to this effect, and Miss Atkins then reported to their offices for further assignment.

On the above basis we find the instant claim to be without support and same is herewith declined."

By agreement of the parties the two claims have been combined in the Statement of Claim submitted to the Board.

III. THE ISSUES

Whether Claimant was an "employee" within that term as defined in Title I, Section 1, Fifth, of the Railway Labor Act; and

Whether Claimant came within the ambit of the term "employees" in Rule 1 (a)--the Scope Rule--of the Memorandum of Agreement executed by the parties on August 5, 1964; and,

Whether Claimant was and is entitled to the wages and seniority rights (including investigation and hearing as an indispensable condition precedent to dismissal after 60 or more days service) and other emoluments and conditions of employment prescribed in said Agreement.

IV. PERTINENT STATUTORY PROVISIONS

The following definitions found in Title I of the Railway Labor Act is pertinent:

"Section 1. Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect"

* * * *

"Section 2. First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions"

V. PERTINENT RULE SCHEDULE AGREEMENT

Rule 1 of the Memorandum of Agreement, under the caption Scope and Work of Employees Affected, provides in material part:

"(a) These rules shall govern the hours of service and working conditions of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees as such craft or class is, or may be, defined by the National Mediation Board and, except as specifically provided herein, all such work of said craft or class, at any place it occurs on Carrier's lines or offices, shall be performed exclusively by employees subject to the scope of this Agreement, regardless of time devoted to its performance. Positions or work referred to in or coming within the scope of this Agreement belong to the employees covered thereby and no work or position shall be removed from the application of these rules except by agreement between the parties signatory hereto;"

VI. RESOLUTION OF ISSUES

Carrier admits that the position filled by Claimant is fully covered by the Agreement and the work of that position is exclusively reserved to employees within the collective bargaining unit. The sole defense proffered by Carrier is that Claimant was the employee of an independent contractor; not its employee. From this premise it argues that Claimant was not covered by the Agreement.

Clerks assert that since the position filled by Claimant is fully covered by the Agreement and the work performed by her in that position is exclusively reserved to employees covered by the Agreement she, res ipsa locquitor, was an employee of Carrier in the collective bargaining unit within the contemplation of Rule 1 (a) and contractually entitled to the guarantees of the collective bargaining agreement.

1. The Statutory Provisions

✓ Inasmuch as Carrier admits that Claimant at all times performed the work of the position under its sole direction - - not that of Kelly - - we find Claimant was Carrier's employee within the definition of that term in Title I, Section 1, Fifth, of the Railway Labor Act.

We find that Title I, Section 2, First, imposes a statutory duty upon Carrier and employees to maintain the collective bargaining agreement. Any scheme, with or without intent, to evade or avoid the Congressional mandate must be held to be nugatory. ✓

The collective bargaining representative - - Clerks here - - have a statutory duty to police the collective bargaining agreement. No individual within the collective bargaining unit may to his individual satisfaction, lawfully, compromise the terms of the collective bargaining agreement.

2. The Rules Agreement

Carrier has admitted that it contracted that the work performed by Claimant "shall be performed exclusively by employees subject to the scope of this agreement." [Emphasis supplied.] Further, it contracted, Rule 1 (a), supra, that:

"....Positions or work referred to in or coming within the scope of this Agreement belong to the employees covered thereby and no work or position shall be removed from the application of these rules except by agreement of the parties signatory hereto"

[Emphasis supplied.]

This provision is unambiguous and unequivocal. Pointedly, Carrier contracted not to remove any position or work covered by the Agreement from the rules of the Agreement "except by agreement of the parties." It is a principle of contract construction that when an exception is prescribed in an agreement no other can be implied. Here Carrier admits it acted without satisfying the expressed exception. Ergo, Carrier violated the Agreement.

Clerks admit that Carrier had the right, when no qualified employee(s) bid on the position here involved, to seek in the marketplace a person qualified to fill the position. It disavows any interest as to how the person that meets the Carrier's requirements is selected. But, it says when the Carrier, under such circumstances, places a person on a position, covered by the scope rule, doing work exclusively reserved to employees within the collective bargaining unit of the collective bargaining agreement, the person selected and so assigned by Carrier becomes, de facto, an employee within the contemplation of Rule 1 (a) of the Schedule Agreement. We agree. Therefore, we find that Claimant was an employee within the meaning of the term "employees" in Rule 1 (a) of the Memorandum of Agreement; and, she stood in the position of all other employees covered by the collective bargained agreement.

VII. THE REMEDY

Having found that Claimant was an employee within the contemplation of Rule 1 (a) of the Agreement we will:

1. Sustain paragraph 1 (a) of the Statement of Claim except the seniority date shall be July 13, 1965, instead of July 12, 1965 as stated in that paragraph;
2. Sustain paragraph 1 (b) of the Statement of Claim to the extent that Carrier shall pay Claimant the amount of pay she would have received from Carrier as a covered employee less the amount of pay she received from Kelly during the period July 13, 1965 to December 10, 1965, inclusive;
3. Sustain paragraph 2 (a) of the Statement of Claim to the following extent: (a) Carrier shall offer to reinstate Claimant to its service to the status she would enjoy absent Carrier's violation of the Agreement; (b) Carrier shall make Claimant whole by paying to her what she would have earned from Carrier in the period from December 13, 1965, to the date Carrier offers her reinstatement less what she actually earned during that period.

FINDINGS:

Public Law Board No. 119, upon the whole record and all the evidence, finds and holds:

1. That Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;
2. That this Board has jurisdiction over the dispute involved herein; and,
3. That Carrier violated the Agreement.

AWARD

Claim sustained with Remedy as prescribed in Opinion.

ORDER

Carrier is hereby ordered to make effective Award No. 1, supra, made by Public Law Board No. 119, on or before

March 28, 1968

John H. Dorsey
John H. Dorsey, Chairman
Neutral Member

D. G. Vane (DISSENTING)
D. G. Vane, Carrier Member

C. E. Kief
C. E. Kief, Employee Member

Dated at Chicago, Illinois, this *27* day of *February* 1968.