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"Never a Fee!"

The Miracle of the Postmodern Temporary Help and Staffing Agency

George Gonos

Historical and legal research challenges the staffing industry's claim that it charges "no fees" to workers, and provides scholarly support for the spreading "right-to-know" movement among temps and contract workers for the disclosure of hidden, and often exorbitant, agency markups.

Temporary workers are never charged a fee of any kind.
—National Association of Temporary Services

"DON'T Buy Jobs"—that was the slogan of the old Industrial Workers of the World as they campaigned in Spokane in 1909 against the excessive fees charged by the seedy employment agencies that lined the streets hiring workers for the abundant jobs in lumbering, railroads, construction, and farmwork. In the churning turn-of-the-century economy in which millions of workers found themselves constantly on the move in search of their next job, the exorbitant

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fees of the "labor sharks"—as they were often called—became a national scandal. "The necessity of paying for the privilege of going to work," the U.S. Commission on Industrial Relations stated in 1912, "seems foreign to the spirit of American freedom and opportunity."[1] State governments responded by passing extensive regulations, including ceilings on fees, that lasted well into the post–World War II era.

In more recent times, the need to "buy a job" has typically been considered a thing of the past. But with the rapid growth of the temporary help and staffing business over the last twenty years, the practice of paying fees for job placement has made a big comeback. Among "temps" and "contract workers," anger over fees—"anti-agent venom," one story calls it—has been growing, and workers' groups in some states are backing "right-to-know" legislation that would require today's new brands of labor agents—temp and staffing agencies, payrolling firms, and professional employer organizations (PEOs)—to reveal to workers the hidden fees in their employment contracts. A bill requiring rate disclosure recently introduced in Washington State received strong bipartisan support and led to the greatest public airing of the issue to date. Though it failed (last January) against stiff industry opposition, it "showed how powerful the idea of right-to-know is," according to Marcus Courtney of the Washington Alliance of Technology Workers (WashTech), which drafted the bill. The fight against excessive fees for employment is once again growing into a national movement that will not go away soon.

Fees, now barraging consumers in seemingly every transaction, are in the news in other areas as well, in banking, ticket sales, college tuition, investments, phone bills, check cashing, and travel. (A legal battle is now taking place over local ordinances prohibiting banks from surcharging noncustomers at ATMs.) But the subject of fees charged by employment agencies has scarcely received mention and remains a much overlooked aspect of the contemporary employment scene in the United States. One reason for this is the general acceptance—in official circles, at least—of the staffing industry's claim that "temp workers" pay no fees, that this is a burden borne entirely by employers, their business clients. Temporary help and staffing firms market themselves as a free "service" to workers, as clean, high-tech, no-strings-attached, postmodern employing institutions, a way of working just right for the still uncommitted young or the overcommitted parent in need of a flexible schedule.

Through the early 1990s, a job seeker looking through the classified ads placed by temp and staffing agencies would have been assuaged by the following kinds of inducements:

> "No fees" . . . "Not an agency—Never a fee" . . . "Never a fee to the job seeker" . . .
> "All Fees Company Paid" . . . "A fee-paid service"

From its birth in the late 1940s, the staffing industry used these claims to build what became by the 1970s and 1980s the fastest-growing industry in the country. Nowadays, although ads placed by temp agencies dominate the "help wanted" sections of many major newspapers, industry representatives say the idea that they charge no fees to workers has become so widely accepted that these printed claims have become largely unnecessary. Still, the "no fees" claim is continually reiterated in broadcast ads, industry literature, and orientation videos used with job applicants in agency offices. If the existence of fees is acknowledged at all, they are said to be "client-paid," covered in their entirety by the industry's business clients, the firms that employ temporary help.

But temp and contract workers are prone to a different view, seeing the spread between the hourly rate charged to their employer and their own pay rate as a hefty fee skimmed off by an intermediary for work they perform. Otherwise, why would they be making less than those "regular employees" doing the same job next to them? And why would their agent be driving a Jag while they're in a Hyundai?

Historical fact supports the workers' position. A careful study of the employment agency business over the past century reveals that the current "no fees" claim rests solely on technical changes in the legal definitions of *fee* and *employment agency* quietly won by the staffing industry through its active lobbying campaign over the last four decades. These changes simply allow the industry to mask fee-charging methods that have been prevalent for over a hundred years. Early in the twentieth century, the common legal definition of employment agency *fee* included (in addition to any direct charges) an employment agent's "markup"—that is, the difference between the billing rate to business clients and the pay rate to workers—and most states set maximum fees and required that "fee schedules" be displayed to workers and reported to the state. Under these old rules, temp and staffing agencies would be seen today as charging enormous fees. Recalling this early history gives support to the current fight for full disclosure.

But this history was "forgotten" when industry lobbying efforts, beginning in the 1960s, forced the elimination of definitions of *fee* that included an agent's "markup." At first, these moves were aimed specifically at allowing the newly emerging "temporary help industry" to operate outside state employment agency laws. Then, quite rapidly, in the 1970s and 1980s, as the industry won acceptance of the notion of "client-paid" fees, other types of private personnel firms were deregulated, on the basis that they charged no fees directly to workers. With state sanction, a bevy of personnel consulting, staffing, payrolling, and outplacement firms now appeared and put themselves forward as free "services" to workers. Most recently, the new doctrine of "client-paid fees" has been used to legalize referrals to commercial agencies made by the historically free public employment service, and to promote temp agencies as legitimate providers of employment for former welfare recipients. With these mutations in fee-charging practices in recent decades, the staffing industry has, on a massive scale, instituted a sophisticated indirect means of charging fees, while successfully concealing their amount, resulting in higher charges than could ever have been wrung from workers by traditional employment agencies operating under the old laws. What follows traces the story of how fees for employment were allowed to go unregulated, uncounted, and, according to many workers, out of control.

The "Markup"

What is the typical markup rate? If required of agencies now, what would their fee schedules reveal to workers?

Temp and staffing firms operate differently than the traditional or "permanent" employment agency that collects a one-time fee for the *placement* of a worker and then leaves the picture. While it "assigns" workers to client firms, the staffing agency keeps them on its own payroll, charging its business customers an hourly billing rate, and paying workers' wages out of the total receipts. The agency's "markup" is the difference between the billing rate charged to client firms and the workers' pay rate. The agency thus profits from every hour that a worker is on the job, whether the worker's employment (with one or several client firms) lasts a week, six months, or several years.

Because they are unregulated, markups range widely and reflect what the market will bear. Using figures from the American Staffing Association, we can estimate that between 1990 and 1998, the industry's markup peaked at 48.7 percent in 1992, and has declined to about 35 percent since then. Competition between agencies for long-term or high-volume contracts may sometimes force the markup under 30 percent, but billing rates this low are considered "ridiculous" in the trade. While the usual markup lies between 30 and 50 percent, higher markups are common. Aggressive agencies often keep over 50 percent or more of the billing rate, and opportunities for gouging are legendary. One broker who was interviewed admitted to billing a client in a tight spot at $90 an hour while paying the worker his regular rate of $22. WashTech recently analyzed more than 190 billing rates charged by a staffing firm supplying workers to Boeing and found that the average markup exceeded 200 percent. In one case, Boeing was charged $80 an hour, while workers were paid $21.63, a markup of nearly 400 percent. Temps must beware of "bad apple" agencies that don't pass increases along to temps when their billing rates to client companies are raised.

For workers, the lesson lies in the dollar amount of the difference. One temp making $6.50 an hour, who discovers that the agency is billing $10.50 (a typical spread in the industrial and clerical sectors), complains that for a seven-hour workday the agency "skims off $28 a day for work I'm actually doing" (Brigham 1995, 16). Because markup rates remain the same whatever the wage level, higher-skilled contract workers and professionals (for example, in high-tech, law, pharmaceuticals, and health care) are disproportionately profitable for staffing companies. Markups in the accounting field range from $20–30/hour for general accounting to $50–60/hour for special project work. Given that the average broker in the high tech field keeps 35 percent of the billing rate, the Tech Exchange, a Boston-based group, calculates that on a six-month contract at $50/hour, the agency commission is $17.50 an hour, $700 a week, and, over the course of the six months, amounts to $18,200. For many workers, agencies provide no services and, as Mike Blain of WashTech puts it, are just "glorified money launderers."

The staffing industry's overall "take" has been growing steadily. If an old-fashioned fee schedule for the entire industry were presented to workers for 1998, it would indicate fees of *$15.2 billion*, a figure that is no doubt conservative, since the American Staffing Association does not represent or count the personnel business as a whole.

Management Savings and Worker Losses

The "no fees" claim implies that workers incur no loss of earnings when a staffing agency is used. At the same time, however, agencies promise "management savings" for their business clients. ("Comforce has helped some clients cut labor costs by as much as 50 percent.") It would seem that some magical trick is involved whereby these savings on labor costs are accrued without corresponding losses to workers.

But as Bennett Harrison and Barry Bluestone have pointed out, "What is labor cost to the firm . . . is the principle source of income for the vast majority of the population" (1988, 38). Hence, in reality, the other side of management savings is diminished earnings for workers. Numerous government and academic studies have concluded that temp workers bring home 25–40 percent less pay than those who hold comparable regular employment, closely reflecting the typical markups reported above. (Even young people just entering the workforce make about 16 percent less as temps, the 2030 Center, a Washington nonprofit group, found). In addition, temps rarely receive health benefits from their agency, and usually either go without, or piggyback on the coverage of family members or taxpayers. Moreover, because of nonquantifiable factors such as missed opportunities for advancement or training, empirical studies tend to underestimate the real losses that temp workers incur over time. (For example, "permatemps" at Microsoft are owed an estimated $40–100 million in stock options they were precluded from purchasing).

Concealing Fees in the Temporary Employment Relationship

Agencies use extensive, often blatant, measures to keep their billing rates a secret from workers. Their "markup" is the staffing industry's biggest trade secret, the "great untouchable topic," as the publication *Contract Professional* called it (Darby 1998). As workers and organizers know, no other information is so fiercely guarded in its day-to-day dealings.

Ensuring its ability to hide the markup was a major reason the industry pursued legal exemption from employment agency laws. In 1960, before the deregulation of temp and staffing agencies, twenty states required that maximum "fee schedules" be posted in agency offices for workers to see. For temp firms, which were viewed by many state regulators at that time as regulated employment agencies, the fee schedule would display the hourly amount being billed the business client (the billing rate) on one side and the hourly wage paid the worker on the other, thus clearly revealing the markup. "It is important," a New Jersey court stated in upholding the requirement in 1957, "for the worker to know how the money paid by the customer will be divided as between [the agency] and himself."[2]

The industry despised the requirement to post fee schedules more than any other provision of law. (Community groups found that temp agencies commonly flouted it.) Winning exemption from this requirement, along with fee ceilings, provided the industry with considerable relief and resulted in the situation faced by temporary workers today: no regulation of the amount of the markup and no requirement for agencies to make it known. Further complicating and mystifying the situation, the industry obscures not only the amount of the markup, but also its own method of calculating it, which often varies from standard procedure.

In an openly self-serving and transparent practice, agencies forbid temps from ever inquiring about the wages of other workers or about the firm's billing rate (for example, from supervisors at the work site). The agreement that temps sign typically contains a clause such as the following: "I understand that all matters relating to wages and rates are necessarily confidential and will never discuss same with clients or others."

In the same vein, an introductory video shown by Kelly Services bluntly warns, "Your pay rate is confidential and must not be discussed." Though of dubious legality, such warnings seem to a surprising extent to produce their desired effect, keeping temps in the dark about what regular employees or other temps make on the same job and about what their agency is receiving for their work. ("In the U.S.," Thomas Geoghegan has quipped, "the only wages we can debate are the wages of ballplayers" [1995]). Though many workers believe that their agency's markup is excessive, very few know the precise amount, and neither do most community organizers or state regulators. Due to effective concealment, it is safe to say that workers paying fees out of their own pockets early in the twentieth century knew more about the actual cost to them of working through an agency than their counterparts do today.

In the ideology of the industry, fair wages are guaranteed by the intense competition between agencies for qualified, reliable workers. "If [an agency] charges excessive prices," says the CEO of one staffing firm, "the market will turn away from them. . . . Clients and contractors [workers] will vote with their feet if they haven't gotten a good deal" (Darby 1998, 45). But this old "open shop" theory is undermined by the industry's own policy of secrecy: Workers can't apply market pressure on bad agencies without information about what other workers are making or how much is being charged for their work. The idea of a free market for temp labor is also undermined by the use of restrictive contracts that limit workers' mobility. In many "payrolling" arrangements, workers are *told* which agency they must work through, and often must sign a noncompete agreement. "In most cases," says Mike Blain of WashTech, "you cannot shop around. These primary vendors have contracts that ensure them a steady supply of new workers, no matter how poor their job placement services or benefits." Hence the current movement among temps and contract workers for "full disclosure" agencies.

Due to staunch opposition from the industry, efforts to pass state right-to-know legislation have not yet succeeded. In the meantime, WashTech publicizes on its Web site information it obtains on billing rates and, along with other grass-roots organizations, seeks voluntary industry compliance. The "Consumers Guide to Best Practices Temp Agencies," produced by the Task Force on Temp Work in Hackensack, New Jersey, in which workers share their experiences, including information on pay rates, is designed to overcome the problem of secrecy. The National Alliance for Fair Employment (NAFFE), a coalition of groups representing contingent workers, is now launching a national "code of conduct" that calls on staffing agencies to provide workers with information on the rate that client employers are paying them. Says the Contract Employees Handbook, published by the Professional Association of Contract Employees, "An agency that withholds the bill rate has a license to steal" (Ziegler 1999). Why not lift the "iron curtain" over our wages, put all the agencies' wages and billing rates online, and let workers do comparisons and "shop around"?

Historical Regulation of Employment Agencies

The current antiagency movement mirrors one from the past. In the half-century between the widespread appearance of private employment agencies in the 1890s and World War II, a broad movement grew up in opposition to "the vampire system." Public opinion generally held that neither employers nor workers should have to pay for assistance in the employment process. In the words of Justice Louis Brandeis in 1917: "There gradually developed a conviction that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment. And many believed that such charges were the root of the evil."[3]

From before World War I, states responded with extensive efforts to regulate all aspects of the employment agency business, including fees. By 1928, twenty-nine states had set maximum fees. When, in that year, the Supreme Court outlawed fee ceilings as an illegal form of price fixing, many states forced disclosure by requiring agents to post their fee schedules in a "conspicuous place" in their offices and to file them with the state.

Free public employment offices, many of which had been established by states and municipalities, were seen as a natural alternative to commercial fee-charging firms. In 1933, the charter for the United States Employment Service (USES) forbade the referral of workers to agencies that charged *either workers or employers* a fee. But the issue remained a volatile one. Congressional hearings in 1940 focused attention again on the "excessive fees, paid by workers for employment, out of all proportion to the wages earned." And in 1941 the Supreme Court reversed its earlier ruling, once again allowing states to set ceilings on employment agency fees, a practice that continued into the post–World War II period. Through the mid-1960s, state departments of labor strongly pursued the regulation of employment agencies, and fee regulation specifically. For the present-day staffing industry, then, the "no fees" claim has provided an escape from this historically tight, even life-threatening, oversight.

Fee-Splitting, Temp Jobs, and the Move Toward Continuous Fees

Much of the regulatory effort early in the twentieth century was aimed at eradicating the practice of *fee splitting*, an aspect of the employment agency business that is particularly important for understanding today's situation. Perhaps the most reviled of abuses, fee splitting referred to the collusive arrangement in which an employer agreed to hire workers from a certain agent in return for a share of the fees collected from these workers. This resulted in inflated fees, since employment agents would charge enough to cover both their own costs and the gratuity paid the employer. In addition, fee splitting almost inevitably resulted in another problem for workers, that of accelerated turnover, as workers were discharged solely to make way for others, multiplying the fees to be collected and divided. As explained by the U.S. Commission on Industrial Relations in 1915:

> The foreman agrees to hire men of a certain employment agent on condition that one-fourth or one-half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the agent and more fees collected. (Quoted in Goldberg 1962, 140)

Artificially shortening the duration of work assignments, or making jobs more temporary, increased the immediate profits of both employers and employment agents. Workers often testified that they had been sent to positions that employment agents had represented as permanent or long-term but which turned out to be of short duration. Thus the practice of fee-splitting was widely seen as exacerbating the irregularity of employment. As early as 1913, legislation in eight states and the District of Columbia prohibited the practice. By 1940 the number had grown to twenty-one states. (Fee-splitting was condemned in other professions, such as medicine, as well.)

The "Three Gang System"

Fee splitting could take several forms. Most simply, workers would periodically be sent back to the employment agent for "reassignment" and, after paying another fee, were frequently sent back to the same work site. This arrangement came to be known as the "three-gang system," as it meant having one group of workers on the job, another on its way from the agency, and a third group returning there to be rehired. "Three men for one job . . . and receiving compensation from all," as John Commons described the system in 1916 (1967, 7).

In a more sophisticated version, workers would be forced to pay the agent a certain percent of their wages each week or month, i.e., a regular fee, for the promise of holding their jobs against other workers. Taking it one step further, some agents took on the role of paymaster, collecting payments from the employer (to cover wages, overhead, and profit) and deducting their fees before compensating the workers, just as the staffing industry does today. Often, additional charges were deducted for transportation, housing, holding baggage, or other "services" (e.g., the obligatory drink when workers cashed their paychecks).

Rather than a one-time placement fee (for matching a worker with an employer), many early employment agents had thus improvised a means of collecting a *continuous stream* of fees from workers, whether they stayed on a single job or worked at a series of different work sites, and whether for the same or different employers. They did this by forming an ongoing *triangular relationship* with the worker on one side and allied employers on the other. This arrangement not only increased the financial gain for the agent, but was also beneficial to the user of labor in that it served to weaken his ties to these "agency workers" and held down pressure for higher wages.

This possibility of distancing or shielding the actual users of labor from obligation to workers was a prime reason that the "services" of private employment agents appealed to employers, why they might even pay premium hourly rates for this arrangement. (Free public agencies could not serve the same function). In many cases, employers refused to hire directly, insisting that workers secure their job through a preferred agency, and possibly even one the employer himself owned or controlled. Thus, some employment agents could receive fees for workers who were actually recruited directly by the employer but sent to the agency to be officially "hired," a practice the contemporary staffing industry calls "payrolling."

These kinds of private personnel arrangements were optimal, then, for both employers seeking labor "flexibility" and employment agents seeking steady income. But as the post–World War II period began, there were compelling reasons that the future of the employment agency business looked problematic to its practitioners. An extensive body of state regulations was in place across the country, and a decidedly antiagency mood prevailed in government. Most states had set maximum fees and outlawed fee-splitting. In 1960 the U.S. Department of Labor recommended maximum fees "for both temporary and permanent jobs." There was also strong support for strengthening the role of the public employment service, to make it the primary way the nation marketed its labor.

This challenge was successfully taken up by the giants of the new temporary help industry, which, led by Manpower Inc., fashioned a masterful solution to the industry's predicament. In the postwar era, collective bargaining had become the main agenda for labor, as opposed to the protection of individual rights vis-à-vis private labor agents. State employment agency laws were relegated to minor importance, receiving little attention from either the public or organized labor, thus making it possible for a quiet industry-run campaign to reverse the trend toward strict state regulation. Beginning in the 1960s, when the temporary help and staffing industry turned to aggressive lobbying in the state legislatures, the Council of State Governments noted that the regulation of employment agencies "deteriorated." The trend now turned to the deregulation of agency fees and, in many states, toward the oversight of employment agencies by generally friendly industry boards.

Eliminating the Definition of Fee as Markup

Through persistent lobbying from the 1960s to the 1990s, the temp help and staffing industry successfully altered the meaning of the terms *employment agency* and *fee* so that they no longer applied to its operations. The first step was the elimination of the definition of fee as markup.

As mentioned above, employment agencies could be divided into two broad types. While the traditional, or "permanent," employment agency collected a one-time fee for matching a worker with an employer, other agencies retained an ongoing attachment to the worker for the duration of the job, or over the course of multiple jobs. In this type of practice, which was emulated by the emerging temporary help industry, the agent regularly collected funds from employers and then paid the worker after deducting his fees.

It is important to note that, from the beginning, both these common types of practices were seen under state laws as employment agencies, and regulated as such. For the latter type, the fee was commonly defined as the difference between what the agency charged its business client and what it paid its workers. This definition of the fee as the agent's "markup" remained a part of employment agency law for much of the nation into the post–World War II period. Thus, in the 1950s and 1960s, state regulators and courts often treated temporary help firms as employment agencies under the law and, along with workers, viewed the spread between the wage rate and the billing rate as a fee.

The industry saw this determination as a death sentence. If *fee* was defined as markup, temp agencies would be forced to reveal their most important secret, the spread between billing rates and wages. Avoiding this, the industry organized nationally in the 1960s for a fight. Shrewdly, the trade association—then the National Association of Temporary Services, now the American Staffing Association—put temporary help firms forward as a "new type of service," not connected with the old employment agency business, basing this claim on the premise that they were legally the employers of workers they assigned to client firms, not "agencies" or labor market intermediaries. In a state-by-state blitz between 1963 and 1971, the industry pushed through quick, often crude, amendments to state employment agency laws across the country, amendments that defined temporary help firms as legal employers, categorically exempted them from state regulation, and specifically eliminated the definition of fee as markup. Miraculously, this could be accomplished in many states with the addition or subtraction of just a few words or a few lines in the statute, and without any public debate (Gonos 1997).

In this way the notion that temp agencies charge no fees to workers was neatly inscribed in law and became part of the accepted logic of employment relations in the contemporary United States. Agency markups now became unregulated and unseen. Thus, speaking in 1971 in support of failed federal legislation that would have re-regulated temporary agencies at the national level, Senator Walter Mondale bemoaned the "unconscionable fees" charged to temp workers, and the fact that "there are no controls or limits on what private temporary help supply firms may . . . charge for what are in substance placement fees."[4]

Soon, this logic would become institutionalized for other types of personnel firms as well.

Spreading the Notion of "Client-Paid" Fees

The next stage in the evolution of fee charging practices, from the mid-1970s through the early 1990s, was the industry's push to ratify the notion of "employer-paid," or "client-paid," fees. During this period a slew of "new" types of personnel firms (e.g., staffing, outplacement, executive search, consulting, and payrolling firms), even many engaged in traditional permanent placement activities, used the claim that workers themselves paid no fees as a basis for exemption from state licensing laws and regulations. Like temp agencies, many of these firms now collected fees "on the back end," from business clients rather than workers, whether these workers were treated as W-2 employees of the personnel firm or not. Their argument to state legislators and regulatory bodies was that since they charged no fees directly to workers, the original reason for their regulation, that is, the protection of workers, had been eliminated.

In 1962, the U.S. Department of Labor had reported that fees were paid by employers only in "rare circumstances." But thereafter the legal environment changed rapidly. Throughout the 1970s and 1980s legislation in many states excluded from regulation those personnel firms whose fees were said to be employer- or client-paid. Based on the assumption that the amount of such fees did not affect workers, these bills were presented by their backers as pro-worker measures, a way to shift the burden of fees from job applicants to employers. Such was the speed and extent of fee deregulation that in 1990 the staffing industry could gladly report that state regulations now applied to "relatively few agencies" (Lenz 1990, 15).

The notion of client-paid fees now became pervasive in the culture of the personnel industry. Trade groups made the most of it in advertising and public relations. In effect, "no fees" came to mean that there is no need for workers to take money out of their pockets to make a payment to the agency, as they had normally done in the earlier history of the industry. But do "client-paid" fees mean, as the industry argues, that there really is no financial liability for workers using a temporary help agency or staffing firm?

Who Really Pays?

It turns out that the idea of "client-paid" fees is actually not a recent one. Workers learned long ago, through experience, to be suspicious of it. Frances Kellor, a progressive-era advocate of worker protections, pointed out in 1914 that agencies advertising "positions furnished free" ultimately found ways to charge workers by reducing wages, or through other means (1971, 164–65). This lesson was reflected in the new employment agency laws passed by states after a 1918 Supreme Court decision disallowed the *abolition* of commercial employment agencies. *These new laws specified that both worker-paid and employer-paid fees would be recognized as fees.* For instance, beginning in 1918 New Jersey regulated any employment agency where a fee is charged or received *"directly or indirectly . . . whether such fee is collected from the applicant for employment or the applicant for help."*

The International Labour Organization reached the same conclusion, and in 1933 defined a "fee charging employment agency" as inclusive of any business that derives *"either directly or indirectly* any pecuniary . . . advantage *from either employer or worker."*[5] As interpreted by the ILO director-general in 1966, this language clearly signified that temporary help firms represented a segment of the fee-charging employment agency business. Following this dictate, Sweden, France, and other nations refused at that time to tolerate them.

Since early in the twentieth century, then, employment agency law in the United States and internationally reflected the realization of pro-worker advocates that so-called client-paid fees were nothing but an illusion or trick. Experience taught that it was a relatively simple matter for labor market intermediaries to pass along to workers the fees ostensibly charged to their business clients by adjusting pay rates in accordance with desired margins, a process that was facilitated by the natural alliance long established between employment agents and the users of labor. Historically, then, the claim that fees were "employer paid" was not an escape from state employment agency regulations.

But that history was "forgotten" and the myth of client-paid fees reborn when, in the 1970s and 1980s, the idea that "no fees" are extracted from workers through temp and staffing agencies was legitimized again and elevated to truth value across the country. Astonishingly, in this age of "plastic money" and "cyber-dollars," the official policy holds that if fees are unseen—if workers do not take money out of their own pockets to pay them—then they do not exist.

While there are some genuine examples of client-paid fees, this is not the case in the temp and staffing business today, where, as a veteran of New Jersey's regulatory unit says, "The worker *always* pays," in the form of substantially diminished wages, benefits, and opportunities. Such "back-door fees," as they are called, have recently become an issue in other fields of business as well.

Fee-Splitting Revisited

The issue of fee-splitting has long disappeared from public discussion. The current view is that it is an antiquity that became extinct with the professionalization of the employment agency business. The spreading acceptance of "client-paid" fees has seemed to make concerns about fee-splitting obsolete.

But a close look inside the staffing industry at how billing rates and pay rates are set may cast some doubt on this optimistic view. Though it has taken on more sophistication, a good case can be made that fee-splitting exists today on a much greater scale than it did in its earlier manifestation, and has only been hidden in the dynamics of the staffing business.

To support the idea that it is a true employer, the industry maintains that agencies set pay rates independently of control from client firms, and that temp workers themselves own a significant degree of bargaining power, especially once they have "proved themselves." But neither of these assumptions reflects the reality. In practice, the client firm's control over the "bottom line" effectively dictates the maximum acceptable rate of pay, and the staffing firm has little or no ability or inclination to absorb wage increases not backed by the client firm. Hence, "If clients tighten the purse strings on one end, brokers have to make up for it on the contractor's end" (O'Connell 1998, 35).

For temps, on the other hand—except perhaps for those at the highest end of the market— there is an almost complete lack of bargaining power vis-à-vis the agency. Although self-help books counsel workers on how and when to negotiate, the great majority of temps face a take-it-or-leave-it proposition on the question of wages.

The only real negotiations over pay go on behind the scenes between staffing agencies and their client firms. These private negotiations, in which workers are not represented, allow the two parties to divide between them whatever additional income can be generated by shaving off a portion of the workers' former compensation package, including wages and benefits. After the current total compensation costs of the client's employees are determined, and the potential "savings" calculated, the two parties literally decide, in the words of one agency manager, to "split the difference" between them.

This picture is supported by the staffing industry's own advertising claims, in which "cost savings" for its business clients are guaranteed. For instance, the ad targeted to potential business clients by Comforce Corporation (the "fastest growing" staffing firm from 1996 to 1998, according to Staffing Industry Report) graphically represents the current cost of the workers' benefits package (health insurance, holidays, sick days) as "your [the client's] savings," while other current employment-related costs become revenues for the staffing firm (Comforce 1999). What was formerly a part of the workers' share of the total revenue stream has been redistributed or split between client firm and agency. (Income may be split with other businesses as well, as when check cashing firms locate within the offices of "day labor" temp agencies, or when transportation to work sites is contracted to an outside firm and deducted from the workers' pay.)

With this practice now ubiquitous throughout the economy, the staffing industry has in effect institutionalized fee-splitting on a massive scale, using the rhetoric of "no fees" or "client-paid" fees to help mask this reality. Like the more overt form of fee-splitting early in the twentieth century (at that time illegal), the "temp work" or "staffing" arrangement generates continuous revenues for the employment agency, and for the client firm a partial return on what formerly were labor costs (as well as a release from legal obligation to workers). The spread of this practice is also one important way that, as economist Robert Kuttner has described, labor markets have been made to function more like spot commodity markets in recent years (1999). Floating pay rates, on which employers bid with staffing agencies daily, serve the cause of wage flexibility, one of the central functions of the staffing industry for corporate clients. The new wave of "fee-splitting" acts to depress wage scales to what classical economists call the "correct" market rate, moving them constantly closer to the subsistence level. In this way, the rapid expansion of the temp and staffing industry helps account for the stagnating wage levels in the United States beginning in the 1970s and the continuation of this trend even in the tight labor markets of recent years.

From the business standpoint, fee-splitting in its current form is clearly superior to the cumbersome old practice in which employment agencies had to collect fees directly from workers and then rebate a portion of these fees to allied employers. First, although rapid turnover is easier than ever, it is unnecessary to achieve the desired results, since long-term assignments generate continuous fees from every hour worked. Second, since fees are paid indirectly, they are invisible, making collection more efficient and the potential for exploitation even greater. There is no need for workers to pay fees out of their pockets, and no need for a "secret kickback" to the client firm.

As compared to the traditional employment agency engaged in *selling* jobs, the "temporary help" industry illustrated the advantages of *leasing* them to workers. As David Dorsey has explained with respect to the business of copy machines, a leasing program keeps the customer tied to the business and habituates him to making regular payments (1994, 137–38). "The whole point is to keep the payments flowing ceaselessly, and slowly getting bigger." Thus, depending on the duration of his or her "temporary" assignment, a worker often ends up paying much more for leasing a job than what would have been the maximum allowable placement fee under state law before deregulation. And, unlike an auto deal, no "buyout" is necessarily ever made. This option, that is, the "conversion" of a temp to permanent status, belongs only to the client firm.

Tied to the staffing agency, what the long-term temp actually pays in fees (or, if one prefers, in reduced compensation) is not only for placement but for the privilege of continuing her employment, a situation in no way different from the extortion practiced early in the twentieth century when agents charged periodic fees in order to "keep" or hold a job for a worker against another.

The Public–Private Split

The latest stage in the evolution of fee-charging practices brings government agencies into the employment triangle. In this formulation, the notion of client-paid fees is stretched further, to include fees paid by public taxes.

This arrangement is exemplified in the new "partnership" that temp and staffing agencies have formed with the public employment service. The doctrine that these private firms charge "no fees" to workers was crucial in justifying the practice whereby "free" public agencies now refer thousands of job seekers to them. This constituted a change in long-standing policy. Based on the record of employment agency abuse and on the principle that job placement services should be free, the U.S. Employment Service (ES) had since its inception in 1933 been barred by federal law from referring workers to agencies that charge a fee *"to either the worker or the employer."* For many years, the private employment agency business had "objected strenuously" to this prohibition, but in the 1980s the widespread acceptance of the notion of client-paid fees provided a new opening. In congressional hearings on the 1982 Job Partnership Training Act (JPTA), the private personnel business pressed for a change. JPTA thus included language—in effect an amendment to the 1933 Wagner-Peyser Act—that allowed public employment offices to make referrals to temp and staffing firms *"as long as the applicant is not charged a fee"* (U.S. GAO 1986, 1, 30).

For a time, the U.S. Department of Labor (DOL) declined to support the new policy. One DOL official raised doubts about the reality of "client-paid" fees (U.S. GAO 1986, 33). (What, he asked, would "preclude the private agency from referring applicants from the State agency to employers who pay the private agency but recoup all or part of the fee from the employee?") It was only under continuing political pressure, bolstered by a

1986 General Accounting Office (GAO) report titled "More Jobseekers Should Be Referred to Private Employment Agencies," that the DOL finally agreed to issue new guidelines to regional ES offices encouraging implementation.

State implementation of the new policy has taken different forms. In New Jersey, temp and staffing agencies seeking referrals from the public ES are required to sign an agreement stating that no applicant referred will be charged a fee. (Of course, the state accepts the premise that all fees they charge are "client-paid.") The program of referrals has grown substantially in recent years, though no data are currently available on their number. According to regional ES staff in several states, temp and staffing agencies make more extensive use of the public employment services than any other group of employers, some using it almost daily as an extension of their own offices, thus "blurring the lines," as sociologist Robert E. Parker says, between themselves as profit-making enterprises and the public-sector services (1994, 25). Temp and staffing firms are also extremely active in the states' new online job matching services, which some say permit them to circumvent rules surrounding the program.

It is also on the basis of the "client-paid" fees doctrine that the states' burgeoning welfare-to-work programs have been transformed into labor brokers. Here, public funds are used to pay subsidies—or a portion of the fees—to temp and staffing firms that either "place" or "hire" former welfare recipients, while the workers themselves pay the rest, through diminished wages as long as they work. The so-called "work first" approach, in which immediate employment is prioritized over longer-term training or education goals, facilitates this transformation in which private agencies profit handsomely from the large number of former recipients entering the workforce. As a staffing industry representative candidly says, "The ability to create a successful alliance between these governmental organizations and the staffing services industry can go a long way in helping to alleviate the recruiting shortages in our industry" (Steinberg 1995).

According to the GAO report, one reason for referring ES or welfare clients to commercial agencies is that "private agencies have so many openings the local Employment Services knows nothing about" (1986). As for why employers prefer to list job openings with private agencies, one reason has usually remained unspoken. As reformer Grace Abbott found in 1908, it is because public agencies have "no fees to divide with contractors" (1908, 294) But, now, with the policy changes allowing public agencies to refer job applicants to commercial labor market intermediaries, these "problems" with the public services may have been rectified. The GAO's report included the suggestion that

> Private agencies should split employer-paid fees with the Employment Service if it supplied jobseekers for private agency job openings. . . .
> This is what private agencies currently do among themselves when they pool resources to match jobseekers with openings. Such fee-splitting would be an acceptable concept, private agency industry representatives told us. (1986, 22)

Since the term *fee-splitting* had never before been used in connection with the employment agency business except to refer to an illegal and abusive practice, the suggestion to lend it legitimacy and involve the state as partner seems particularly chilling. Moreover, in proposing fee-splitting as something the state itself might benefit from, these policymakers are surely stretching the bounds of credibility by also sticking with their position that, with all the "employer-paid" fees to go around, workers themselves are not a penny poorer for it.

As one study shows, the practices of social-service-agencies-turned-labor-brokers favor employers' interests and have "mainly guided the poor into a low-road in the labor market" (Indergaard 1999, 77). The growing program of referrals to private agencies exacerbates the problems of increased fees and accelerated turnover that, as we have seen, have always accompanied fee-splitting. Since neither private nor government agencies effectively monitor job placements to determine either their quality or duration, many of these jobs are revolving doors. And the government subsidies paid to firms "placing" workers is just the start of the fee program. As long as these workers remain "employed" by private agencies, a part of what they earn each hour goes to pad the account of these firms, undermining the workers' ability to gain self-sufficiency, and the welfare-to-work idea as a whole.

The Staffing Industry and the Rise of Inequality

Early in the twentieth century, when "individual bargaining" was still the form of employment relations inscribed in American law, state regulation of employment agencies represented a clear recognition of the need to protect workers from exploitation by the large "movers of labor." In the "New Deal era" of U.S. industrial relations, the main thrust of law and policy shifted to collective bargaining as a mode of protecting workers' rights. But since the mid-1970s, with the decline of unionization and the growing commodification of labor markets, this New Deal era has come to a definite close, and individual bargaining—which for most workers means little or no bargaining—has been reinstituted as the norm for much of the American workforce. As labor historian Melvyn Dubofsky has suggested, labor market conditions have come in many ways to "resemble more the world of the late nineteenth century than that of the New Deal order" (1994, 231).

Part and parcel of this change has been the resurgence of the unregulated labor agent. With the widespread return of agency fees and the pernicious practice of fee-splitting, today's labor market is eerily reminiscent of the "secret rates and rebates" of a past era of employment relations described by Louis Adamik (1958, 23). In the massive and continuous triangular trade of labor each day, we see a contemporary version of the old "vampire system," this time for a workforce made up not just of manual laborers but also of knowledge and high-tech workers, the symbols of the new American workforce. But now, at the beginning of the twenty-first century, after the deregulation of the private personnel business, workers have recourse to few of those early laws that once regulated labor agents.

Through its protracted lobbying campaign, the staffing industry won official acceptance for the idea that it charges workers no fees, and legitimized its claim to a share of the revenues flowing from the relationship between workers and employers. Since the 1970s, the industry has served as a catalyst for the tremendous growth of the "contingent" workforce in the United States. Brokering the sale of labor, and "splitting the difference" in every transaction, the staffing industry has been a key player in what Kuttner calls the "relentless shaving of labor costs"(1999, 80). Its dampening effect on wage gains has yet to be estimated. On the macroeconomic level, the industry has functioned to redivide a portion of the total national income paid out to labor and capital, thereby helping to effect the upward redistribution of wealth that has become a sad motif for our times.

Whether this is legitimate business activity or merely the legalized looting of workers throughout the economy will be a matter for public policy scrutiny in the coming years.

Notes

1. Quoted in *Adams v. Tanner*, 244 U.S. 590, 604 (1917).
2. *Manpower Inc. of New Jersey v. Richman*, Superior Court of New Jersey, Essex County, Docket No. L-22576-56 (June 24, 1957, unpublished).
3. 244 U.S. 590, 606 (1917).
4. *Congressional Record*, U.S. Senate, Oct. 19, 1971.
5. ILO Convention No. 34 Concerning Fee-Charging Employment Agencies, 1933, Article 1.

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