

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1) Carrier violated the rules of the Clerks' Agreement, bearing effective date of September 1, 1949 when it failed to assign an employe covered by the Clerks' Agreement to the position of Assistant Agent at Cedar Rapids, Iowa on May 1, 1950 when that position became vacant.

2) Employe John D. Feiereisen now be assigned to the position and that employe John D. Feiereisen be compensated at the Assistant Agent's rate of pay retroactive to May 1, 1950, the date the Carrier filled the position by assigning an employe not covered by the Clerks' Agreement.

EMPLOYEES' STATEMENT OF FACTS: Included under Rule 1(b) of the Agreement with the Carrier, effective September 1, 1949, copies of which have heretofore been filed with your Honorable Board and by this reference hereto are made a part hereof there is listed certain positions of Assistant Agents. Included in that group is the Assistant Agent's position at Cedar Rapids, Ia. which is in Seniority District No. 33.

On the effective date of the agreement, this position was filled by Employe William Kinder, who prior to being assigned to position of Assistant Agent at Cedar Rapids, held the position of Chief Clerk at Kansas City, Mo. a position likewise covered by the Clerks' Agreement. Due to illness, Employe William Kinder requested and was granted leave of absence effective on or about March 1, 1950 and the position of Assistant Agent at Cedar Rapids was filled by Employe Feiereisen at the request of management, and he filled this position until May 1, 1950.

Employe Feiereisen has a non-clerical seniority date in District No. 33 of November 24, 1937 and a clerical date of January 24, 1940. In addition to having filled the position for about two months in 1950 the employe, in a notarized statement addressed to all concerned, stated that he held the position for about a week again in 1951 and further that he has at various times throughout the years he has worked at Cedar Rapids, performed the duties of Assistant Agent whenever the regular occupant of that position was on vacation or sick leave.

LOCATION OF ASST. AGENT'S POSITION	NAME OF APPOINTEE	PERIOD DURING WHICH ASST. AGENT POSITION OCCUPIED
Rockford	F. R. Lewis	March 30, 1942-April 5, 1944
"	J. T. Gerkie	Aug. 28, 1944-Jan. 20, 1946
"	R. J. Kemp	Feb. 1, 1946-July 15, 1949
Minneapolis	A. C. Anderson	April 1, 1943-July 31, 1946
"	F. R. Lewis	May 1, 1947-June 30, 1949
Cedar Rapids	R. G. McGee	March 15, 1937-March 31, 1943
"	Leon Huffman	April 1, 1943-Aug. 14, 1944
"	M. W. Van Sickle	May 1, 1950-Sept. 1, 1951
"	D. N. Doumas	Sept. 1, 1951-present date
Milwaukee	F. R. Lewis	July 1, 1949-June 1, 1952

Of course, these positions, like all other 1 (b) positions, on many occasions prior to the time that they were included within the scope of the Clerks' Agreement, were filled by the appointment of employees other than those holding seniority under the Clerks' Agreement.

In addition to the Assistant Agents' positions cited above, there have been many other 1 (b) positions filled since January 16th, 1946 by the appointment of employees who held no seniority under the Clerks' Agreement.

This submission on the part of the Clerks' Organization is in effect a request that your Board write into our Clerks' Agreement a new provision which places a restriction upon a right which the Carrier has always had.

There is no rule or agreement that restricts the right of the Carrier to select for these Assistant Agent positions anyone whom they may desire and your Board has on many occasions said that "all inherent rights of management that the Carrier has not contracted away remain with it." In this case, the Carrier has not contracted away its unrestricted right to fill by appointment the position of assistant agent at Cedar Rapids, Iowa.

All data contained herein has been submitted to the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: The within claim involves the following provisions of the Clerks' Agreement, effective September 1, 1949:

"Rule 1—Scope:

"(a) These rules shall govern the hours of service and working conditions of the following class of employees, subject to exceptions noted below:

"* * * * *

"(b) Only Rules 1, 3 (a), 3 (b), 3 (c), 3 (e), 3 (i), 39 and 57 will apply to the following positions:

"* * * * *

"* * * * *

Assistant Agents:
* * * Cedar Rapids, * * *

"* * * * *.

"(e) * * * * *.

Positions within the scope of this agreement belong to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 57.

"* * * * *"

"Rule 57. This agreement shall be effective as of September 1st, 1949 and shall supersede and be substituted for all rules or existing agreements, practices and working conditions (except those not in conflict with this agreement) and shall remain in full force and effect until it is changed as provided for in the Railway Labor Act as amended."

The Carrier twice appointed persons from outside the ranks of Clerks to fill the position of Assistant Agent, Cedar Rapids, a position listed in Rule 1 (b) of the Agreement.

Since the instant position is not subject to the Promotion and Bulletin Rules of the Agreement the Organization has not questioned the Carrier's right to fill the same by appointment. The Organization, however, vigorously opposes the appointment of persons to the listed positions who are outside the coverage of the Clerks' Agreement contending the above noted paragraph of Rule 1 (e) restricts not only the position and the work of the position to the Clerks but also the source from which appointments can be made.

Both parties have cited past awards of this Division to the effect that the duties of a position listed or included within a scope rule belong to the Organization negotiating the rule or agreement. (Awards 3360, 3563, 5790, 6141, 6348 and 6357). Hence, having listed the subject position in the scope rule, this Carrier could not, without subsequent rule change, assign the work of the position to a member of any Organization than that of the Clerks'. We are constrained to construe the above-quoted paragraph of Rule 1 (e) as simply a contract expression of such principle.

Under the terms of Rule 1 (b) the occupant of the position in question is subject to but four of the fifty-two rules contained in the Clerks' Agreement. He is however, given seniority under the Agreement at the time his pay starts.

Carrier relies upon the principle that all inherent rights of Management, (which would include the right to hire whomsoever it chooses) that it has not contracted away, remain with it. In view of this principle and the past practice shown of record, we hesitate to hold that the quoted paragraph of Rule 1 (e) goes beyond that which we have above indicated, in its scope and effect. In short, clear and unambiguous contract provisions should be found before an inherent right of either Management or Employees should be taken away.

Recognition of the Organization's contentions apply to a limited extent by agreement in the Note and sub-Agreement applicable to Rule 1 (c) and (d) positions. The positions listed in these groups are, in the main, of lesser importance and of narrower specialization. But even as to those positions the Carrier's final judgment regarding appointments remains unimpaired in the final analysis. Any ruling which would narrow Management's discretion in respect to the more responsible positions of Class 1 (b) would seem illogical in absence of clear and unambiguous language to the contrary.

The intended import of the Note is somewhat confused by the phrase in parenthesis giving departmental preference. The intention of the parties becomes clearer if we read the first sentence of the Note without the distracting effect of the enclosed phrase, i.e., "In filling positions listed in Rule 1 (c) and 1 (d), preference shall be given to employees coming under the provisions of this agreement.* * *" Being thus specially treated it follows that no such preference prevails in respect to the positions listed in the other classes. Again, if the Organization was correct in its contention that all appointments must come from the ranks of the Clerks and departmental preference was

special to Rule 1 (c) and 1 (d) positions, why did not the parties simply state this intention in said Note as follows: "In filling positions listed in Rule 1 (c) and 1 (d), preference shall be given to employes in the department in which the positions exist." No need would exist for the remainder of the sentence reading "coming under the provisions of this agreement," if the contention was correct.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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

The claim is not supported by the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 25th day of June, 1954.