Award No. 12148
Docket No. CL-11871

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. Carrier violated and continues to violate the rules of the Clerks' Agreement when on November 14, 1958 it abolished Cashier Position No. 161 at Fargo, N. D. while most of the duties of that position remained to be performed and assigned the remaining duties to the Agent, an employe not covered by the Clerks' Agreement.

2. Carrier shall now be required to return the work which was attached to Position No. 161 and performed by the former occupant of that position to employes in Seniority District No. 40.

3. Carrier shall be required to compensate Employe Louis Lotzer and all other employes affected as the result of the abolishment and removal of the clerical work which comprised clerical Position No. 161 at Fargo, N. D. from the scope and application of the Clerks' Agreement for eight (8) hours at the pro rata rate of Position No. 161 from February 11, 1959 until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to November 14, 1958 the Carrier maintained at Fargo, N. D. an office force consisting of the following:

Agent

Chief Clerk

Cashier

Cashier Position No. 161 was occupied by Employe Louis M. Lotzer with a clerical seniority date of October 1, 1925 and a non-clerical date of January 14, 1923. The position was assigned from 8 A. M. to 12 Noon and 1 P. M. to 5 P. M. daily Monday through Friday. The assigned rest days were Saturday and Sunday. The cashier position had been in effect for more than 30 years. The principal duties regularly performed by Employe Louis Lotzer were as follows:

There is no basis for this claim. There has been no violation of the schedule rules. The Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to November 14, 1958 Carrier maintained three positions at Fargo, North Dakota, cashier, chief clerk, and agent. Effective November 14, 1958 Carrier abolished Cashier Position No. 161 and assigned the remaining duties to the agent. Claim is made that the work transferred to the agent was contrary to the Clerks' Agreement, and compensation is sought for Employe Louis Lotzer and all other employes affected as a result of the abolishment of Position No. 161.

Organization takes the position that Rule 1(e) of the Scope prohibits Carrier from removing work from the clerk and transferring it to employes not covered by the Agreement. It argues further that since clerks performed this work before the abolition of Position No. 161 this work rightfully belongs to this class of employes. This party also cites Rule 57 to support its contention that Carrier acted improperly when it transferred the work to employes outside the Scope Agreement by unilateral action.

At the outset Carrier asserts that the portion of the claim which reads, ". . . and all other employes affected," should be dismissed because a submission for unnamed Claimants is not in compliance with Article V of the 1954 Agreement. On the merits, Carrier maintains that the Scope Rule does not reserve the work in question to Claimants and that assignment of work does not create exclusive right.

As to the issue raised by Carrier concerning unnamed Claimants, we find that although Claimants are not specifically named the requirements of Article V, Section 1(a) of the National Agreement are complied with because Claimants' identity can be readily ascertained.

On the merits, the significant question to be determined is whether the work transferred to the agent after the abolishment of Cashier's Position No. 161 is reserved exclusively to clerks.

We first look to the Scope Rule for guidance on this issue and find that it lists the positions but does not delineate the nature of the work to be performed. Organization, however, submits that since the Scope lists the position of cashier and since the clerk performed cashier's duties, position and work are synonymous; and thus the disputed work is reserved exclusively to clerks. We find, on examination of the record, that in negotiation in connection with revision of the schedule rules, Organization attempted to include the word work along with the word position. Carrier, however, refused to include other than positions within the Scope of the Agreement. In view of the failure of the parties to be explicit in the Agreement on work after deliberation on this issue, we find there was no intent to make the terms work and position synonymous. In determining whether work and position are synonymous, we find that the numerous awards are in disagreement. Because the parties in the instant case did not intend to make these terms synonymous, we are in accord with Awards No. 11755 and No. 11577 which deny the contention that position implies work.

Our study of the record also leads us to the conclusion that the cashier did not at all times exclusively perform the work in question. The cashier's

position was added to that of agent and clerk when the growth of business at Fargo, North Dakota increased. Thus we note that the agent did do cashier's work prior to the addition of a clerk, the cashier. Furthermore, on a few occasions when the cashier was ill the agent performed cashier's work. For these reasons, it appears that the work was interchangeable and not exclusively performed by clerks. The shrinkage of business led Carrier to exercise its management prerogative of reducing the number of employes and of transferring the remaining work to the agent. It had the right to transfer the work to the agent because this was work previously interchangeable between clerks and agent.

We do not observe in Carrier's abolishment of the position and transfer of the remaining work to another employe an intent to violate the collective bargaining agreement as suggested by Organization. We agree that collective bargaining agreements must be respected, but we find that the factual situation in the case of United vs Webster, 299 F2d 195, cited by Organization to support its position that transfer of work to an employe outside the Scope has the effect of destroying the collective bargaining agreement is dissimilar to that in the case at bar. In the Federal decision a position was not abolished nor was the dispute work interchangeable. Instead, non-union workers were hired to perform the identical work done by union workers who then were dismissed. Clearly the dismissal was for the purpose of destroying the collective bargaining agreement. In the instant case, on the other hand, Carrier created the cashier's position when business conditions required an additional worker and correspondingly abolished it with the decrease of business.

Both parties cite awards to sustain their positions concerning the interpretation of Rule 1(e). In these cases the factual situations are similar, but the conclusions reached in the decisions are contrary. Award No. 9416 cited by Organization holds that the work is exclusively reserved to clerks, while Awards No. 9219 and 9220 submitted by Carrier find that the clerks duties transferred to the agents are not exclusive. Since in the instant case, we conclude that the work was interchangeable between agent and clerk and not specifically reserved in scope to the clerks, we agree with the latter two awards which hold that there was not a violation of Rule 1(e); and, therefore, there was no need for Carrier to negotiate as provided for under Rule 57.

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 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 of the parties was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1964.

CARRIER MEMBERS' CONCURRENCE TO AWARD 12148 DOCKET CL-11871

We concur with Award 12148 in denying the claim on the merits, but dissent to that portion of the opinion reading:

> "At the outset Carrier asserts that the portion of the claim which reads, '. . . and all other employes affected,' should be dismissed because a submission for unnamed Claimants is not incompliance with Article V of the 1954 Agreement. * * *"

Part III of Carrier Members' dissent to Award 10969 is hereby adopted and made a part of this dissent. The above phrase does not name the claimant as required by Article V of the 1954 National Agreement and should have been dismissed.

W. M. Roberts
G. L. Naylor
R. E. Black
W. F. Euker
R. A. De Rossett

LABOR MEMBER'S DISSENT TO AWARD 12148 DOCKET CL-11871

In Award 12148 the Referee, by resort to the use of the general rule or "test" of "exclusivity" improperly resurrected and condoned the "ebb and flow" theory which had been abrogated by the provisions of the Agreement involved. This Board has many times held that Scope Rule provisions, such as we had here, reading:

> "Positions within the scope of this agreement belong to the employes 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.",

have abrogated the "ebb and flow" theory. See Awards 3563, 5785, 5790, 6141, 6144, 7047, 7048, 7372, 8079, 8673, 8674. See also Awards 5785, 8234, 8500, 9219, 9220 and 9416, between these same parties.

It seems that although nothing in the Agreement could be construed to permit the removal of positions from the application of the Agreement, that it is also necessary to compose and agree on language which will guard against some general test or rule promulgated by outsiders from being construed so as to permit that which the Agreement was designed to prohibit. The work here involved was clerical work which comprised the duties of a clerical position. The clerical position was abolished but the duties of the position remained and were turned over to other than clerks, which the above rule was designed to prohibit.

Therefore, while the Referee properly held that the claim met the requirements of Article V, Section 1(a), the improper reinstitution or resurrection of the "ebb and flow" theory requires a dissent.

D. E. Watkins 2-26-64