Award No. 12149
Docket No. CL-13302

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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 (GL-5144) that:

1. The Carrier violated and continues to violate the Clerks' Rules Agreement when it abolished clerical Position No. 705 at Rothschild, Wisconsin, and assigned and continues to assign work which was a part of that position to outsiders not covered thereby.

2. The Carrier shall now be required to compensate Employe H. A. Randrup for eight (8) hours at the overtime rate of his clerical Position No. 17 for Monday, November 7, 1960, and each subsequent Monday that the Agent performs clerical work which was a part of Position No. 705, or is a part of Position No. 17, until the violation is corrected.

3. The Carrier shall now be required to compensate Employe H. A. Randrup for one (1) hour per day at the overtime rate of his regular clerical Position No. 17 for Tuesday, November 8; Wednesday, November 9; Thursday, November 10, and Friday, November 11, 1960, and each subsequent Tuesday, Wednesday, Thursday and Friday of each week following these dates that the Agent performs clerical work which was a part of clerical Position No. 705, or is a part of clerical Position No. 17, until the violation is corrected.

4. Reparation due the employe to be determined by joint check of payroll and/or other Carrier records.

EMPLOYES' STATEMENT OF FACTS: Prior to November 4, 1960, there were two clerical positions in effect at Rothschild, Wisconsin — Position No. 17, Clerk, and Position No. 705, Clerk. The work weeks of these positions were staggered to provide the service necessary on six days per week.

Position No. 17, which is a six-day position, is assigned Tuesday through Saturday with Sunday and Monday rest days. Employe H. A. Randrup is the regularly assigned occupant of this position.

which was exclusively covered by the scope of the Clerks' Agreement, as the employes are attempting to establish. The Clerks' Organization does not, as has been conclusively shown, have exclusive claim to any station work at Rothschild, Wisconsin.

The principle involved in the instant dispute is identical to that involved in Third Division Awards 9219 and 9220, which, as stated, had the same parties to dispute and the same rules and in this regard, it is significant to note that Awards 9219 and 9220 denied the employes' claim.

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: Carrier maintained two clerk positions, No. 17 and No. 705 at Rothschild, Wisconsin. Position No. 17 is a six-day position to which the occupant is assigned Tuesday through Sunday with the rest day on Monday; Position No. 705 is a five-day position on which the employe works Monday through Friday with Saturday and Sunday as rest days. Effective November 5, 1960, Carrier abolished Position No. 705, and the agent at Rothschild was assigned the remaining clerical work previously performed by the occupant of Position No. 705. In addition, the agent performed the duties of the occupant of Position No. 17 on Mondays, the assigned rest day of that employe. Effective January 30, 1961 Carrier took this rest day work from the agent and assigned it to the occupant of Position No. 17 on an overtime basis.

Claim is made by employe H. A. Randrup, occupant of Position No. 17, that Carrier violated the Clerks' Agreement when it assigned the clerical duties of the abolished Position No. 705 to the agent who is outside the Scope of the Agreement. Request is made for overtime pay for the Mondays that the agent worked on the rest days of the occupant of Position No. 17.

Petitioner contends that the work was assigned to the clerks and, therefore, was exclusively theirs under the Scope Rule. He argues that Rule 1 (e) prohibits the removal of positions from the Scope Rule unless made in the manner prescribed in Rule 57, which is by way of negotiation and agreement. The contention of this party is that position and work are synonymous, and, therefore, removal of work is also prohibited.

Carrier denies that the disputed work was ever exclusively performed by clerks, and maintains that assignment of work does not grant to that class of employes the exclusive right to perform these duties. It also rejects the interpretation that position is synonymous with work.

The basic question to be answered is whether the work transferred to the agent is exclusively reserved to clerks. Based upon our review of the record, we conclude that the work transferred to the agent was not exclusively performed by the clerks. The parties, the factual situation, the contention and the Agreement in the instant case are similar to those in Award 12148. Since our finding of failure to show exclusiveness is the same as that in Award 12148, we correspondingly follow our reasoning presented there, and again hold that the Agreement was not violated.

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.

LABOR MEMBER'S DISSENT TO AWARD 12149, DOCKET CL-13302

In Award 12149, 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.

The improper reinstitution or resurrection of the "ebb and flow" theory requires a dissent.

D. E. Watkins
Labor Member