Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7928
Docket No. 7832
2-L&N-CM-'79

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: (System Federation No. 91, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

1.(a): That Carman J. S. Adams, hereinafter referred to as the Claimant, Montgomery, Alabama, was improperly withheld from service from 9:30 A.M., July 2, 1976, through August 15, 1976, inclusive, in violation of Rule 34 of the Agreement, and that

(b): accordingly, the Louisville and Nashville Railroad Company, hereinafter referred to as the Carrier, be ordered to compensate Mr. Adams 261½ hours at straight time rate plus all overtime that he would have earned had he not been withheld from service from 9:30 A.M., July 2, 1976 through August 15, 1976.

2.(a): That the Carrier is misinterpreting Section 5(b) of Appendix "B" of the Agreement effective April 18, 1946, that provides an employee the opportunity to "...refuse a call,..." and then be "...dropped to the bottom of the board.", when they did not allow the Claimant to "refuse a call".

(b):That accordingly the Claimant was not insubordinate when he attempted to "refuse a call" from the Road Miscellaneous Overtime Board on July 2, 1976.

3.(a): That the Carrier is reading into the Agreement that which is not covered when they give "actual days suspension" to it's employees such as the Claimant.

(b): That accordingly, the Carrier should be advised that such actions as given the Claimant prior to negotiations are improper and not covered by the Agreement.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was relieved of duty the morning of July 2, 1976 and issued a notification of investigation the evening of July 2, 1976, informing Claimant he was charged with insubordination arising from his refusing to perform work assigned and that a formal hearing was scheduled for July 8, 1976. The formal investigation proceeded as scheduled and on August 6, 1976, Claimant was notified he was found guilty as charged and was being given a forty-five (45) day actual suspension from service commencing July 2, 1976 and continuing thru August 15, 1976.

Claimant reported to work on time for his first shift tour of duty, Friday morning, July 2, 1976 following a sixteen (16) hour rest period. Approximately two (2) hours into the shift, Claimant was informed by his supervisor that he was being called for a road trip to repair several cars on "line of road". Claimant indicated to his supervisor he could not go on the road trip. Claimant's supervisor told Claimant he would have to take the matter up with the General Foreman and the two immediately departed to see the General Foreman. The General Foreman was apprised by the Car Foreman in the presence of the Claimant, that Claimant wanted to talk to him about turning down a road trip. The General Foreman asked the Car Foreman what he had said to Claimant and the Car Foreman replied he told Claimant he had to go on the road trip unless he (the General Foreman), would give him permission not to go. The General Foreman then told Claimant he had to go on the road trip and at this time Claimant informed the General Foreman he had improtant business to attend to that evening. The General Foreman related to Claimant that the only basis upon which he could turn down the road trip was to have a doctor's appointment. After Claimant had asked and was informed that the road trip was to Evergreen, Alabama, approximately a one hundred (100) mile trip from Montgomery, Alabama, Claimant informed the General Foreman he had a valuable saw on the back of his truck and requested he be allowed to mark off for about thirty (30) minutes so he could return the saw home. The General Foreman refused Claimant's request, indicating that Claimant could put the saw in any building on the premises where it would be locked up, but that he (General Foreman), would not assume responsibility if anything happened to the saw. Claimant then asked the General Foreman to remove him from the overtime board so he would not have to go on the road trip and the General Foreman refused this request. The Claimant then indicated he would go on the trip and left the Foreman's office. However, several minutes later, Claimant returned to the office with his Local Chairman who asked the General Foreman if Claimant had to go on the road trip, to which the General Foreman replied he did. Claimant then stated he could not go and when asked by the General Foreman if he was refusing to go, Claimant indicated in the affirmative. At this point, the General Foreman instructed the Car Foreman to relieve the Claimant from duty and to make him out as of 9:25 AM, July 2, 1976. The Claimant asked the General Foreman what the instruction meant and the General Foreman told Claimant he

was relieved from duty. Claimant responded that his eye was hurting him but said to the General Foreman that if it meant he was to be held out of service, he would go on the road trip. The General Foreman toldClaimant it was too late, he had already been relieved of duty and instructed the Car Foreman to call another man for the road trip.

The Organization contends Carrier violated Rule 34 of the Controlling Agreement when on July 2, 1976, Carrier put Claimant on actual days suspension prior to scheduling a formal hearing. Rule 34 was violated, the Organization reasons, because the rule does not provide for "actual days suspension" and therefore the Carrier is reading into the Agreement that which is not written therein. The Organization takes the position Claimant was wrongly, improperly and harshly removed from service, as Claimant was not insubordinate because he never refused to perform work assigned to him on July 2, 1976. Indeed, the Organization maintains, Claimant reported on time for his first shift tour of duty and during the course of performing his regularly assigned duties was approached by his supervisor who apprised Claimant he was going on a road trip.

The Organization takes the position Claimant was within his contractual rights to refuse the road trip assignment under the overtime provisions of the Controlling Agreement of September 1, 1943 as set forth specifically by section 5(b) of Appendix B, effective April 18, 1946. The Organization interprets section 5(b) of Appendix B as permitting an employee to refuse a call and that following such refusal, the employee will be dropped to the bottom of the overtime board. In support of its position, the Organization cites Second Division Award 3676 quoting in part from from the Carrier's submission in that case, as follows:

> "Carrier asserts that conclusive evidence is shown in the foregoing to prove its contention that a full understanding prevailed with respect to intent and application of that portion of the Memorandum Agreement of April 18, 1946, pertaining to the privilege of employes refusing overtime calls, the understanding being that the privilege exists only when call is first received."

The Organization submits that Claimant communicated to his supervisor that he could not accept the call immediately upon receiving the call. In addition, the Organization takes the view that Claimant's reasons for refusing the call were justifiable, notwithstanding a bulletin issued by Carrier under date of May 24, 1974, setting forth responsibilities of being on the overtime board and conditions under which overtime calls could be refused. The Organization further submits, that other employees were allowed to refuse a call for the same road trip that day of July 2, 1976. In fact, the Organization asserts, it is a well established practice at Montgomery, Alabama as well as throughout the Louisville and Nashville Railroad, that an employee is allowed to "refuse a call" and as a result will be dropped to the bottom of the overtime board.

Further, the Organization takes the position the General Foreman is wrong in his contention that overtime work is included in an employee's regularly assigned duties. Finally, the Organization contends, both the Foreman and General Foreman misinterpreted provision 5(b) of Appendix B of the Agreement, when they prevented Claimant from refusing the overtime call because they considered Claimant's reasons to be insufficient.

Carrier takes the position that Claimant was insubordinate in refusing to make the road trip and that insubordination is justifiable grounds upon which an employee can be relieved from duty pending an investigation. Therefore, Carrier reasons, Claimant was rightly suspended in accordance with Rule 34.

Carrier contends the road trip assignment, because given to Claimant while he was on duty and under pay, constituted regularly assigned work. Therefore, Claimant was insubordinate when he refused to perform his assigned duties on July 2, 1976. Carrier maintains that under the circumstances, it would have been justified in dismissing the Claimant and therefore, asserts the forty-five (45) day actual suspension from service is not in violation of Rule 34.

In reviewing the record, the Board finds that the road trip assignment given the Claimant on the morning of July 2, 1976, did not fall within the scope of Claimant's regularly assigned duties that day and therefore said assignment was subject to the overtime provisions set forth in Appendix B of the Controlling Agreement. The Board makes this determination based on the following observations:

(1) Despite Carrier's protestations that the road trip fell within the purview of Claimant's regularly assigned duties, the Carrier nevertheless treated the road trip in every respect as an overtime assignment. Among other things, and by Carrier's own admission, Carrier employed the "calling principle" when making the selection for the two road trip positions. Had this, in fact, not been an overtime assignment, the Carrier would have selected any other carman on duty July 2, 1976 but Carrier did not. Carrier confined itself solely to using the Miscellaneous Overtime Board in making its selection for the road trip. In addition, Carrier also permitted others called from the overtime board that day to decline the road trip assignment without imposition of disciplinary action.

(2) The General Foreman's response to the situation in at least the following two instances appears to support the contention the General Foreman treated the road trip as an overtime assignment:

(a) General Foreman indicated to Claimant that the only way he he could decline the road trip would be if he had a doctor's appointment. This response appears to be in keeping with the contents of the bulletin dated May 24, 1974 and issued by the General Foreman apprising employees on the overtime board, that only reasons of sickness and emergencies would be considered

when an employee declined an overtime call. Incidentally, the Board notes that if the aforementioned bulletin was found to be of import in the instant case, which this Board does not so find, Claimant was not expressing and never at any time did express an unwillingness to make the road trip based on the grounds he did not like the assignment. Instead, Claimant expressed reasons for declining the road trip which could have been construed under the May 24, 1974 bulletin as constituting an emergency.

(b) When Claimant, during discussion with the General Foreman about the road trip, asked if he could be removed from the overtime board, the General Foreman responded by refusing the request. Had the road trip been a regularly assigned duty, as posited here by the Carrier, the General Foreman simply could have told the Claimant his request to be removed from the overtime board was not relevant under the circumstances. This however, was not the General Foreman's response.

(3) Carrier had knowledge in advance of securing the two required carmen, the road trip would involve a substantial amount of overtime, as the trip entailed a journey of approximately one hundred (100) miles. Carrier therefore should have been cognizant of the fact the overtime provisions would be applicable, for to believe otherwise would be to render Appendix B of the Controlling Agreement meaningless. More specifically, if overtime assignments were, in fact, part and parcel of regularly assigned duties, there would be no need to cover overtime assignments as such in the collective bargaining agreement.

In finding the road trip to be an overtime assignment, the Board concurs with the Organization's position that Claimant had a contractual right, as conferred by section 5(b) of Appendix B, to refuse the trip. The Board also determines that section 5(b) of Appendix B, supercedes the contents of the bulletin issued by the Carrier under date of May 24, 1974 over the General Foreman's signature and therefore is controlling. As such, the Board notes that section 5(b) of Appendix B does not require submission of a reason or reasons for refusing an overtime call. Neither does section 5(b) of Appendix B provide for any disciplinary action in the event an overtime call is refused. The Board believes that if any disciplinary action could be contemplated by employees in their assertion of section 5(b) rights, then no employee would make application to the Miscellaneous Overtime Board for fear that when his turn came up and the call was refused, he would become subject to some form of discipline.

Section 5(b) is not the standard rule. Ordinarily, employes should obey and grieve later. Here, Claimant was in pursuit of contractual relief, which had been previously agreed to by the Carrier and Employe Representative. In the instant case the alleged insubordination cannot be upheld. Absent a finding of insubordination, the Board notes that Carrier did violate Rule

34 by suspending Claimant prior to affording him a formal hearing. However, this finding of a violation of Rule 34 by this Board is made with the benefit of hindsight and the Board wishes to state for the record, that it is not in agreement with the Organization's position regarding other alleged violations of Rule 34 by the Carrier.

Finally, absent an act of insubordination, the Board finds the discipline assessed by the Carrier discriminatory, arbitrary and excessive and rules to sustain the claim. The Carrier is directed to compensate the Claimant for 261½ hours at straight time rate.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this