Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11559
Docket No. 11402
88-2-87-2-50

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

PARTIES TO DISPUTE:
(Brotherhood Railway Carmen of the United States
(and Canada
(
(Birmingham Southern Railroad Company

STATEMENT OF CLAIM:

1. That the Birmingham-Southern Railroad Company, hereinafter referred to as the Carrier, violated the Agreement, particularly Article 6, Paragraphs (c) and (e), when they required Carman R. D. Gentry, hereinafter referred to as the Claimant, to work seven (7) consecutive days in a work week and only allowed him straight time rate for all seven (7) days, January 17 through 23, 1986.

2. And accordingly, the Carrier should be ordered to additionally compensate Claimant for the difference between straight time and time and one-half on January 22 and the difference between straight time and double time on January 23, 1986 or a total of twelve (12) hours at straight time as a result of said violation.

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 employes 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 assigned to #4 Relief Truck Job at Carrier's Birmingham, Alabama, facility. This position was scheduled to work from Friday through Tuesday, with Wednesday and Thursday as rest days. During the workweek which is the basis of this Claim, Claimant worked as follows:

"Friday, January 17th - 7 AM to 3 PM
Saturday, January 18th - 4 PM to 12 Midnight

Sunday, January 19th - 4 PM to 12 Midnight
Monday, January 20th - 7 AM to 3 PM
Tuesday, January 21st - 7 AM to 3 PM."

On January 20, 1986, Carrier posted a notice which said:

"Effective immediately, #4 Relief Truck Job is abolished."

On January 22, 1986, Carrier posted another notice which said:

"Effective immediately, #4 Relief Truck Job is abolished."

This second notice made no reference to the first notice. In fact, while both parties make vague references to the reason for the second notice, there is nothing in this record to clearly explain why the two notices were posted to accomplish the abolishment of the same position. The fact remains that #4 Relief Truck Job was not abolished on January 20 but was, in fact, abolished on January 22.

Coincidental with the actual abolishment of the #4 Job, a new position - #6 Truck Job - was advertised for bid with a workweek of Wednesday through Sunday with rest days of Monday and Tuesday. According to the Carrier, Claimant, on Friday, January 24 (the closing date of the advertising bulletin) filed a bid for the #6 Job. Again, according to the Carrier, Claimant was assigned to and worked on the #6 Job beginning Friday, January 24. There is nothing in the record to indicate when on January 24 Claimant submitted his bid for the position which he assumed and worked on January 24.

Here the case becomes convoluted. The two Claim dates are Wednesday, January 22 and Thursday, January 23 - days which would have been the assigned rest days of the #4 Relief Truck Job. However, the #4 Relief Truck Job was abolished "Effective immediately" by notice dated January 22. There is nothing in the record from either party to show when on January 22 this abolishment notice was posted. The record does show, however, that Claimant was used to perform service on the first shift (7 AM - 3 PM) on both Wednesday, January 22 and again on Thursday, January 23. The record also indicates that he was paid at the straight time rate on each of these days.

The Organization argues that the service was performed on the assigned rest days of #4 Relief Job and therefore should be paid for at the time and one-half and double time rate, respectively. The Organization further argues that the abolishment notice of January 22 did not provide a 5-working day advance notice, and therefore, the proper abolishment date should have been January 26.

Carrier contends that, on this property, there is no 5-working day advance notice requirement to abolish positions; that the 5-working day advance notice provision found in Article 23 of the Rules Agreement applies only

to "reduction of forces" and does not (and has not been) applied to realignment and/or readvertisement of positions as was done in this case. Carrier also contends that Claimant was "voluntarily permitted" to work in the 34th Street Car Shop on Wednesday, and Thursday, January 22 and 23 "strictly as a courtesy" and that this voluntary performance of service did not qualify him for premium payment on either date because he was, at the time, either an "unassigned" employee or was "moving from one assignment to another."

We have read the record of this case, listened to and considered the arguments advanced by the parties and have studied the prior Awards presented in support of the respective arguments.

This case, not unlike the opinion expressed in Award 8040 of this Division, "...is a most unusual and difficult case." None of the Awards presented by the parties is 'on point' with the facts of this case. Some of the Awards presented by both sides contain bits and pieces which may or may not be applicable to the fact situation which exists here. We will, therefore, make our own Award in this case based upon our understanding of the facts and applicable rules as we understand them in this particular record.

First, on the issue of improper notice of abolishment, the Organization acknowledges in its presentation to this Board that:

> "... while Carrier may be technically correct in their statement, the fact remains that the National Agreement of June 5, 1962 (quoted above) specifically provided that employes working on reguarly established positions where existing rules do not require advance notice before such position is abolished, not less than five (5) working days advance notice shall be given before such positions are abolished; ...."

However, after advancing that argument, the Organization advanced a Claim, not for the alleged violation of the advance notice rule, but rather for the alleged violation of the premium pay for work on Rest Days Rule. We do not in this case have sufficient proof on which to base an opinion relative to the presence or absence of a 5-working day advance notice in situations where, as here, forces are being rearranged rather than being reduced. Therefore, we dismiss that issue.

Secondly, on the issue of work on rest days and the proper premium payment for such work - which is the primary thrust of the Organization's presentation - we look to the language of Article 6(c) of the Rules agreement, which says:

> "6(c) Employees worked more than 5 days in a work week shall be paid one and one-half times the basic straight-time rate for work on the sixth day and double the basic straight-time rate for work on

> the seventh day of their work week in accordance with Article 6(e), except where such work is performed by an employee due to moving from one assignment to another or, to or from a furloughed list."

Article 6(e) which is referenced above provides as follows:

> "6(e) All agreements, rules interpretations and practices however established, are amended to provide that service performed by a regularly assigned hourly or daily rated employee on the second rest day of his assignment shall be paid at double the basic straight time rate provided he has worked all the hours of his assignment in that work week and has worked on the first rest day of his work week, except that emergency work paid for under the call rules will not be counted as qualifying service under this rule, nor will it be paid for under the provisions hereof."

It is clear from this record that #4 Relief Truck Job was not abolished until Wednesday, January 22. With the abolishment notice dated January 22, it is inconceivable that the notice could have been posted sufficiently in advance of the start of the tour of duty on January 22 to remove Wednesday, January 22 as a rest day of the assignment of #4 Relief Truck Job. Regardless of the "voluntary" nature of the work performed or the "courtesy" which Carrier alleges it extended to Claimant, he was used to perform service on Wednesday, January 22 - a rest day of his assignment - and he is entitled to payment at the time and one-half rate for such rest day work - and we so rule.

However, the Claim for Thursday, January 23 stands on another footing. On that date the abolishment of #4 Relief Truck Job had taken effect. The subsequent assignment to #6 Truck Job had not yet become effective. The service performed by Claimant on January 23 - again regardless of the "voluntary" or "courtesy" nature thereof - was service which he performed as an unassigned employee and for which he was properly compensated at the straight time rate of pay. That portion of the Claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1988.