

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee.

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that J. C. Bell, Stower-Fireman at Salt Lake City Freight Station, shall be paid time and one-half rate in accordance with Rule 41 instead of pro rata rate for eight hours work performed on each Sunday, October 20, November 3, 17, 24, December 1, 8, 22, 29, 1946, January 5, 12, 19, 26, February 2, 9, 16, 23, March 2, 9, 16, 23, April 6, 13, 20 and May 4, 11, 1947.

JOINT STATEMENT OF FACTS: During the season of the year that it is necessary to furnish heat at Salt Lake City Freight Station a position titled Stower-Fireman is established. This position has been designated by the Carrier as one necessary to the continuous operation of the carrier under the provisions of Rule 41.

Mr. J. C. Bell was assigned to the position of Stower-Fireman from October 16, 1946 to May 15, 1947 inclusive, six days per week with Wednesday as the regularly assigned rest day, and he was paid pro rata rate for work performed on Sundays. Each Wednesday Mr. Bell was relieved by a stower from the platform force who was regularly assigned six days per week excluding Sundays and the holidays specified in Rule 41. During the season of the year that it is not necessary to furnish heat Mr. Bell is assigned as a stower with the regular platform force, six days per week excluding Sundays and holidays.

POSITION OF EMPLOYEES: The employees contend that the carrier violated Rule 41 when Stower-Fireman J. C. Bell was relieved each Wednesday by a stower from the platform force who was regularly assigned six days per week exclusive of Sundays and holidays. Bell was regularly relieved by Stower Fritz Olson on Wednesdays. On two occasions when the regular platform force was worked on Sunday, Olson worked eight hours as stower each Sunday, November 17 and 24, 1946, being paid time and one-half rate for such service, and he relieved Bell as stower-fireman on his designated rest day the following Wednesdays, November 20 and 27, while Bell was paid only pro rata time for work performed on Sunday.

It is our position that a regularly assigned employee cannot legally be used to relieve an employee on his assigned rest day when the carrier has designated a position as necessary to the continuous operation of the carrier. We also contend that the position of stower-fireman is not properly one which is necessary to the continuous operation of the carrier. On each Sun-

Carrier cannot agree with the Organization's contention that an incumbent assigned to a position necessary to the continuous operation of the Carrier must be relieved by a **regularly assigned relief employee**. Rule 41 does not so provide and furthermore that is not always possible. In this particular case Stower-Fireman Bell was relieved by a stower who was regularly assigned six days a week, excluding Sundays and Holidays, this arrangement being necessary due to fact Bell's position was the only continuous operation position to be relieved. See National Railroad Adjustment Board Third Division Award 596. During the period involved in this dispute no furloughed or extra men were available, and, as a matter of fact, due to shortage of freight handlers, warehouse forces worked nine hours per day, the ninth hour being at time and one-half rate, from October 22, 1946, to November 28, 1946, and periodical overtime as required since that date.

The Carrier also cites National Railroad Adjustment Board Third Division Award 2536 in support of its position, which Award stated the elements that go with a position necessary to the continuous operation of the Carrier are:

- (a) The position must be worked seven days a week.
- (b) There must be a regularly assigned incumbent to it.
- (c) The incumbent must be assigned one regular day off in seven.
- (d) The incumbent's day off must be filled by a regularly assigned employee.

The Carrier holds that the principles set forth in Award 2536 were complied with in the instant case and that claim of Stower-Fireman J. C. Bell should be declined.

OPINION OF BOARD: The Claimant in the instant case is claiming pay at the time and one-half rate instead of pro rata rate for his work on certain Sundays during the period from October 16, 1946 to May 15, 1947. During this period Claimant was assigned to the position of Stower-Fireman at the Salt Lake City Freight Station, a position established for such period during which time of the year it is necessary to furnish heat in said station. The Claimant was assigned six days per week with Wednesday as his rest day and was paid pro rata for his Sunday work.

On Claimant's rest day his position was filled by a stower from the platform force who was regularly assigned six days per week with Sunday off. On Wednesday he filled Claimant's position and worked the other five days as a stower. On five Sundays during the period Claimant was off on account of sickness and his position was not filled. On those days the furnace was cared for by other employees regularly assigned to positions necessary to the continuous operation of the Carrier.

The Organization contends that the position of Stower-Fireman was not "necessary to the continuous operation of the carrier" within the meaning of Rule 41, the standard Sunday and Holiday Work Rule. The Organization makes this contention on the ground that the position is not filled for 365 days each year; that the position was not filled on certain days when Claimant was ill; that the position is only assigned during the winter months; and that this position has nothing to do with the operation of trains or with the continuous service of the Carrier.

The joint statement says that this position was established "During the season it was necessary to furnish heat at Salt Lake City Freight Station." The parties do not say for what purpose the heat was necessary, but we may assume that the heat was necessary to make it possible for employees to work in that station, to prevent perishable shipments from freezing and to prevent plumbing from freezing and bursting. It is admitted by the parties that other employees working in this station were doing work which was necessary to the continuous operation of the Carrier. The work of furnishing heat which would make is possible for those seven day employees to do their work would also be work necessary to continuous service. The prevention of the freezing of perishable freight and of the plumbing in the station would also be necessary to continuous service.

We must, therefore, hold that the work of operating the heating plant in this station "during the season * * * that it is necessary to furnish heat" was work which was necessary to the continuous operation of the Carrier, even though the work was not directly involved in the operation of trains.

Nor does the fact that this position was not filled during the summer months, when heat was not necessary, prove that the position was not necessary to continuous operation. Many seasonal positions are just as necessary to continuous operation during such seasons as are other positions which are necessary throughout the entire year. We do not intend by this statement to hold that temporary or emergency work could be used as a basis for claiming the advantage of the exception to the Sunday and Holiday Work Rule.

Judge Royal A. Stone, sitting as Referee with this Division in Award 1394, held that the occupant of a seasonal position, the duties of which included tending a furnace during the season when heat was necessary, "was not necessary to the continuous operation of the Carrier." The opinion assigned no reason for so holding. The Organization there, in discussing the work of Claimant, stressed the contention that "None of this work has anything to do with the operation of trains, therefore it cannot be considered as necessary to continuous operation of the Carrier." As "further evidence" that the position there was not necessary to continuous operation, the Organization cited the fact that on two holidays the claimant had worked the position "only five hours and twenty minutes."

Finally in the Position of Employees in that case the Organization stated:

"Further support of the Employees' position is the fact that when the cold weather was over in the Spring of 1939, the assignment was reduced to six days per week, the occupant still having Saturday as his assigned rest day."

While we should not lightly disregard definite holdings of prior awards, it seems probable that in that case Judge Stone was influenced by the contention of the Organization that none of the work of the position had anything "to do with the operation of trains." This Division has many times held and all parties now agree that the term "a position necessary to continuous operation" is not limited to positions the work of which has to do directly with the operation of trains.

We do not feel that Award 1394 with no assigned reason for the holding should be considered as a binding precedent for the instant case.

The fact that this position was not filled during certain days the Claimant was ill does not prove that the position was not necessary to the continuous operation of the Carrier. On such days that part of the work which was necessary in furnishing heat was performed by other seven day employees. This Division has held in many awards that the Carrier is not permitted to blank a position which is necessary to continuous operation for a day of any part of a day. By so doing the Carrier violates the Agreement but does not prove that the position is not necessary to continuous operation, where the necessary work of the position, as here, is performed by other employees in addition to their regular duties. The days we are here discussing were part of the regular assignment of the Claimant, not his rest days. On his regular rest days his position was filled by another employe who was regularly assigned thereto. On the days in question, the days when Claimant was ill, the Carrier asserts, and it is not denied by the Organization, there were no furloughed or extra men available.

This Division has held that the rest day of a seven day position necessary to continuous operation must be filled by an employe regularly assigned to the relief of such position; that the work of such a position cannot be done on the rest day as additional duties by other employees working on their regular positions on such rest days, Awards No. 336 and No. 594, nor by another employe "temporarily relieved from his other duties to perform duties in this position." Award No. 3910.

In many awards we have said that on the off day such a position must be filled by an employe regularly assigned thereto. The writer has been cited

to no award in which this Division has held that such a relief employe must be assigned to any certain number of relief days per week in order to be considered as a "regularly assigned" relief employe as to a position on which he is assigned to work relief on the same day each week. If Claimant's position were not properly filled on his rest days that fact would not entitle Claimant to pay at the time and one-half rate on Sundays, Award 3910, but only to pay for his rest days which he was not permitted to work. That claim, however, has not been presented for our consideration.

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 Carrier did not violate the Agreement as alleged in this claim.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of October, 1948.