Award No. 11594
Docket No. TE-10251

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Central Railroad of New Jersey, that:

CLAIM NO. 1

1. The Carrier violated the Agreement between the parties when, on February 20, 1957, it declared the second-shift towerman's position at "BT" West Brills Tower (New Jersey) abolished while a substantial part of the work of the position remained to be performed. And, concurrent with said abolishment, the Carrier rearranged the hours of service of the first-shift towerman's position at West Brills Tower to extend over a period of eleven (11) hours and ten (10) minutes in order to cover the work of the abolished position.

2. The Carrier shall, because of the violation set forth above, restore the second-shift towerman's position at "BT" West Brills Tower to the Agreement and its former occupant, G. Brennan, thereto, and compensate him for any loss of wages, plus travel time, and/or other expenses incurred due to Carrier's improper abolishment of his position; and

3. The Carrier shall, in addition to the above, restore R. Cobb, C. Travella, C. Carpini, K. Gilbert, L. DiLeonardo and R. Gee to their respective positions from which displaced due to Carrier's improper abolishment of the position in question, and compensate them for any loss of wages, plus travel time, and/or other expenses incurred due to Carrier's violative act.

CLAIM NO. 2

1. The Carrier, except for the period March 16 through March 22, 1957, violated the Agreement between the parties when on February 20, 1957, it declared the second-shift towerman's position at "PB" Passaic Draw abolished while a substantial part of the work of the position remained to be performed. And, concurrent with said abolishment, the Carrier rearranged the hours of service of the first-shift at "PB" Passaic to extend over a period of eleven (11) hours and ten (10) minutes in order to cover the work of the abolished position.

2. The Carrier shall, because of the violation set forth above, restore the second-shift towerman's position at "PB" Passaic Draw to the Agreement and its former occupant, J. Mulroy, thereto, and compensate him for any loss of wages, plus travel time, and/or other expenses incurred due to Carrier's improper abolishment of his position; and

3. The Carrier shall, in addition to the above, restore W. Fleming, D. Daly, and F. Failo to their respective positions from which displaced due to Carrier's improper abolishment of the positions in question, and compensate them for any loss of wages, plus travel time, and/or other expenses incurred due to Carrier's violative act.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the parties to this dispute effective June 15, 1944, as amended. At page 26 of this Agreement are listed the positions at "West Brills BT Tower," as well as the position at Passaic Draw "PB" Tower. The listings read:

		Hourly-rate
West Brills "BT" Towerman	(3)	$ .88
Passaic Draw "PB" Towerman	(3)	.83

The rate of the positions have been subsequently increased as a result of the several National Wage increases collectively bargained, and in accordance with the Cost-of-Living Wage Adjustment of the Agreement of November 1, 1956.

Claim No. 1

On February 18, 1957, Chief Dispatcher J. E. Conover issued the following notice addressed to the "Signalmen" at BT West Brills. (Signalmen is synonymous with Towermen, or Levermen)

"Effective February 20th second trick West Brills is abolished.

Effective February 20th tour duty 1st trick West Brills will be 6:30 A. M. - 11:30 A. M. — 12:30 P. M. - 5:40 P. M."

On April 15, 1957, General Chairman Gerke of the Organization, in his letter of that date, directed to Superintendent J. J. Galuppo the following claim:

"Prior to February 20, 1957, 'BT' West Brills Tower on Central Division was a two trick with tours assigned as follows:

Towerman 6:20 A. M. to 2:20 P. M. Monday thru Friday

Towerman 2:20 P. M. to 10:20 P. M. Monday thru Friday

Closed Saturday, Sunday and Holidays.

Effective February 20, 1957, the second trick was abolished and the hours of the first trick assigned 6:30 A. M. to 5:40 P. M. with one hour lunch period. Monday thru Friday closed Saturday, Sunday and Holidays.

The Carrier affirmatively states that all data contained herein has been presented to the Employes representatives.

OPINION OF BOARD: Early in 1957 Carrier determined that, due to changes in traffic operations, services of towermen at "BT" West Brills Tower and "PB" Passaic Draw would no longer be required after 5:40 P. M. (These towers are located about one mile apart.) Theretofore each tower sustained a two-trick operation, with tours of 6:20 A. M. - 2:20 P. M. and 2:20 P. M. - 10:20 P. M. Effective February 20, 1957 Carrier abolished the two second-shift positions. At the same time it lengthened the hours of the first shift men, placing them on this schedule:

PASSAIC DRAW

6:30 A. M. — 9:35 A. M.

9:35 A. M. — 10:30 A. M. lunch

10:35 A. M. — 5:40 P. M.

"BT" WEST BRILLS

6:30 A. M. — 11:30 A. M.

11:30 A. M. — 12:30 P. M. lunch

12:30 P. M. — 5:40 P. M.

Under the new schedule the incumbent towermen received two hours and ten minutes overtime pay each day (their tours of duty were extended by three hours, ten minutes).

At the outset, Carrier affirms that an identical dispute on this property was disposed of by Award 10979, which decision should make further consideration of the present case unnecessary. A careful reading of that Award, however, reveals that the Organization's claims (identified in that opinion as Parts 1, 3 and 4) regarding abolishment of two towerman positions and requests for restoration of such positions, with back pay for incumbents (as well as other affected employes) was denied for lack of proof. "There is no evidence as to the time of second trick", the Board noted. Consequently, since the merits of the Organization's contractual claims were not passed upon, we have no warrant to accept Award 10979 as precedent here.

While Part 2 of the claim in Award 10979 was sustained, the facts on which the claim was based were somewhat different from those in the present case. There, after abolishing the second trick position at "NA" Tower, Carrier rescheduled the first trick position to cover a spread of 10 hours, 40 minutes, of which one hour was an unpaid lunch period and one hour was paid-for but not worked. The incumbent was actually on duty 8 hours and 40 minutes; however, he received 1 hour, 40 minutes overtime pay. The Board held that this assignment was a violation of Article 25(c):

> "Employes will not be required to suspend work during regularly assigned hours, or suspend work to absorb overtime."

Since, in the matter at hand, the first trick towerman was not required to remain off duty during the course of his tour, Award 10979, again, is not useful as a precedent.

With respect to its various claims here, the Organization argues in substance:

1. Carrier may not unilaterally abolish a position when a substantial amount of work remains, although the rearrangement of work can be had by negotiation with the Organization. (Awards 4042 and 4387). The O.R.T. cites Award 5235 as particularly compelling. Article 31(d), moreover, provides that established positions shall not be discontinued and new ones created covering relatively the same class of work "for the purpose of . . . evading the application of these Articles."

2. Claimants, as a result of Management's improper abolishment of the second trick positions, were forced to suspend work during regular working hours in contravention of Article 25(d).

3. Carrier has no right, under Article 20(a), to establish a regular assignment exceeding eight hours a day. This rule provides that eight consecutive hours or less (exclusive of meal periods) shall "constitute a day's work" with but two exceptions. The exceptions are not applicable here (Article 23 — Intermittent Service and Article 27 — Notified or Called).

Carrier, on the other hand contends:

1. Management may abolish unneeded positions in the interest of efficiency and economy (Awards 10133, 10099, 9211, 9047 and others). There was not sufficient work to justify maintaining the second trick positions in this case since a substantial portion of that work had disappeared. Management does not consider 2 hours, 10 minutes to be "substantial". (Award 6675, it says, rejected Award 5235.)

2. There is no rule in the Agreement which requires Carrier to maintain or establish a regular position to cover 2 hours, 10 minutes' work. Article 11 specifically grants it the right to abolish positions and, moveover, the Board has no authority to restore an abolished position (Award 6455).

3. There is no rule which prohibits scheduling a position for more than 8 hours' work (Awards 9240, 4351, 8346, 10847). In the absence of such restriction, its actions here cannot be set aside. (Carrier affirms that Article 20(a) contemplates that employes can be required to work overtime and, accordingly provides the basis for such payments.)

4. The Organization, for many years, has recognized and acquiesced in the practice, on this property, of establishing and filling regular assignments of more than 8 hours. It cannot now justifiably complain.

The first question to be determined here is whether Management violated the Agreement when it abolished the two second trick positions. There is no real dispute over Carrier's right to eliminate unnecessary positions — nor, on the other hand, is there much dispute over the fact that positions should not be abolished when a substantial part of the work remains. The problem is to determine, in individual cases, whether or not the facts support Management's action. Here, two hours and ten minutes of work remained. This is consider-

ably less than the three hours relied upon by the Board in its sustaining Award 5235. But it is more than the one hour in Awards 9240, 6944 and 5719, or the 1½ hours in Award 4351. (The five hours overtime schedule in Award 10847 was for a limited period — vacation relief — and is not really relevant to our present consideration.) While Article 20 specifically provides for shifts of less than eight hours, that provision may not be reasonably interpreted to mean that any amount of time, regardless of its magnitude, shall require assignment of a full-shift employe. In the two instances here, and without trying to draw a firm line, it is our conclusion that the two hours and ten minutes' work was not sufficient to require retention of a regular position. Management, in other words, did not violate the Agreement by abolishing the two towermen positions in 1957.

What, then, of the claim that rearranging the hours of the first trick towermen constituted an Agreement violation? Standing by itself, and in its present form, Article 20 does not explicitly proscribe establishment of positions requiring more than eight hours' work. Article 20(a) says

> ". . . eight consecutive hours or less . . . shall constitute a day's work for which eight hours pay will be allowed."

While Management is prohibited, under this clause, from granting less than eight hours' pay for, let us say, a six or seven hour position, there is no express prohibition against fixing a schedule of more than eight hours (and paying appropriate rates). Whether such prohibition is implied we cannot say on the basis of information available in this docket. It may be that a study of the parties' discussions leading to adoption of Article 20 would substantiate the conclusion that they intended to limit all regular assignments to eight hours. (That, interestingly, was the position taken by Management in Award 4351 and opposed by the Clerks' Organization.) But that history is not available in the present case.

Furthermore, there is at least some indication in the Agreement that establishment of longer schedules was contemplated by the parties. Article 21(a) — revised in 1946 — refers, in one section, to situations

> "where it is necessary for an hourly rated position to be regularly filled for **eight hours or more a day . . .**" (Emphasis ours.)

True, this is a rest day clause, but the specific reference to a regular position of more than eight hours certainly raises serious doubts concerning the validity of the Organization's claim that no such position can be rightfully established.

Moreover, we may ask whether it is not likely that the parties, had they intended to bar over-eight-hour positions, would have done so explicitly rather than by inference. Cannot Article 20 be reasonably interpreted to mean simply that Management must give eight hours' pay even if a man works less than eight hours — i.e. its principal purpose is to assure regularly assigned employes of a day's pay?

Custom and practice might be extremely useful in fathoming intent in a case like this. Unfortunately, we are foreclosed from considering the question of practice here since Management's evidence on this point was not offered on the property or even in its Ex Parte submission. As for precedent, the only directly related case is Award 5235. But it is not completely clear that the Board intended that decision to stand for the proposition that no regular as-

signment of more than eight hours would be tolerated. Based on a daily three-hour overtime stint, the Board found that there

> "the contract does not support the Carrier in its contention that a position may be abolished and a substantial portion of the work of such position regularly assigned to another to be performed during overtime hours . . ."

(Incidentally, Award 6675, which, the Carrier asserts, expressly rejected Award 5235, concerned the dividing up of three hours' third trick work among a number of employes on other shifts. There was no regularly scheduled shift of more than eight hours as in the case at hand.)

It is our finding, in sum, that (1) abolishment of the two towermen positions did not violate the Agreement, (2) there is insufficient evidence, in this docket, to determine conclusively whether the contract forbids any regular assignment of more than eight hours, as the Organization asserts. (There is no claim, it may be noted, that the excess hours constituted a hardship on the first shift men.)

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 when, on February 20, 1957, it abolished the second-shift towermen positions at "BT" West Brills Tower and "PB" Passaic Draw; and

There is insufficient evidence in this docket to determine the question whether, under the Agreement, the Carrier is prohibited from establishing a regular assignment of more than eight hours.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July 1963.