Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31300
Docket No. MW-30947
95-3-92-3-829

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to give Foreman L.D. Noland a timely and proper five (5) day job abolishment notice [System File 2(107)(91)/12(91-1527) LNR].

(2) The Agreement was further violated when the Carrier readvertised the same position with rest days as Monday and Tuesday, rather than Saturday and Sunday.

(3) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated at the foreman's rate of pay for all time lost.

(4) As a consequence of the violation referred to in Part (2) above, the Claimant's rest days shall be changed to Saturday and Sunday and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

At the time this claim arose, Claimant was assigned as a Foreman on Force 6C06, headquartered at Lexington, Kentucky. Claimant's workweek was Monday through Friday, with rest days of Saturday and Sunday. On May 13, 1991, Claimant's Supervisor issued a notice abolishing Force 6C06 as of end of business on May 17, 1991. Shortly thereafter, Claimant bid on and accepted a Truck Driver position at a lower rate of pay. That position had rest days of Monday and Tuesday.

By letter of August 23, 1991, the Organization submitted a claim alleging that Carrier had violated various Rules including Rule 21, when it failed to give Claimant proper notice of his job abolishment and changed the rest days of the Truck Driver position into which Claimant bid without showing "operational need" to do so. Carrier denied the claim, pointing out that Claimant had been verbally informed that his position was about to be abolished, and that the Agreement was not violated with respect to rest days because the work was changed.

There is no basis on this record to support Paragraph 2 of the Organization's claim. It is apparent that the job bid into by Claimant was originally established with rest days of Monday and Tuesday, and that Claimant was aware of that fact when he bid on the position. Since Carrier operates seven days a week, it is to be expected that some jobs will have rest days other than Saturday and Sunday, and that when employees transfer to such positions, their rest days may be different from what they were on the employees' former position.

With respect to Parargraph 1 of the claim, however, the provisions of Rule 21(b) are clear:

> "... Five working days' notice will be given to men affected before the reductions are made, this five (5) working days' notice not to apply when immediate unforeseen reductions are necessary account of inclement weather. It is understood, that the five (5) days' notice will be a written notice to each individual involved in a particular force reduction."

It is unrefuted on this record that the written notice to Claimant was dated and received only four days prior to the abolishment of his position. Carrier protests that the fact that Claimant bid on and accepted another job without losing a day's work demonstrates that he knew in ample time that his position was to be abolished. That argument is without merit.

In a similar case involving these Parties, Third Division Award 29865 held:

> "... The language of the Rule is clear. Employees affected by a force reduction are entitled to be given a written notice five working days before the reduction will be made. If the notice is given after the working day starts, but the employees affected were told verbally before the working day started, that day still cannot be counted because the Rule makes it clear that the notice must be a written notice. No exception is provided. None can be implied."

In light of the fact that the notice to Claimant was defective by a single day, this Board finds that he is entitled to the difference between his Foreman's pay (the abolished position) and what he received in his subsequent Truck Driver's position, for one day.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of January 1996.

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LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 31300, DOCKET MW-30947
(Referee Wesman)

The Majority clearly failed in its responsibility to review and render a proper decision in this docket. Although the Majority held that the Claimant was entitled to the difference in pay between that of a foreman and truck driver for one (1) day, the facts were ignored and the Majority issued its erroneous award to further deprive the Claimant of his contractual rights. Hence, a limited and constrained concurrence is appropriate. As to the balance of this award, however, it is palpably erroneous and should not be considered as precedent for the following reasons.

First, the Majority completely ignored the direction explicitly enunciated within the very award it cited in support of its findings in this case, i.e., Award 29865, involving the same parties as in this dispute. A review of the precedent cited by the Majority in this case reveals that the clear and unambiguous language of Rule 21(b) states:

> "21(b) Five (5) working days' notice will be given to men affected before the reductions are made, this five (5) working days' notice not to apply when immediate *unforeseen reductions are necessary account of inclement* weather. It is understood, however, that the five (5) days' notice will be a written notice to **each individual** involved in a particular force reduction. It will not be necessary, however, to give this five (5) days' notice to track department repairmen if they are serving on temporary vacancies of less than twenty-five (25) working days."

In the instant case, it is clear that the Claimant was occupying a position of foreman on Force 6C06. It is equally clear that the Carrier's written notice of abolishment was for the positions of one (1) truck driver and one (1) trackman. Hence, the Claimant's position of foreman on Force 6C06 was never abolished in accordance with the clear and unambiguous language of Rule 21(b). The Majority's findings that the written notice was defective by a single day is simply erroneous. It wasn't the timing of the notice that was the issue here, but that of the language of the written notice. The written notice abolished one (1) truck driver position and one (1) trackman position. What is equally clear is that the Carrier never abolished the Claimant's foreman position. Inasmuch as Rule 21(b) states that each individual involved in a force reduction is contractually entitled to a five (5) working day notice and inasmuch as Award 29865 states that the rule cites no exceptions, then none can be implied, the findings of the Majority in Award 31300 insofar as the remedy is concerned is woefully inadequate. In other words, the Board overlooked the fact that the Claimant's position of foreman on Force 6C06 had not been abolished as per Rule 21(b). Nevertheless, the Majority accepted the written notice as to apply to his position and awarded him the difference in pay for one (1) day. The Majority simply erred, much to the detriment of the Claimant and the integrity of the Agreement.

The Majority did not stop there in its wanderings from the clear language of the Agreement and the precedent set forth by this Board. More damage was done when the Majority flippantly stated that:

> "Since Carrier operates seven days a week, it is to be expected that some jobs will have rest days other than Saturday and Sunday, and that when employees transfer to such positions, their rest days may be different from what they were in the employees' former position."

The problem here is that the Carrier never established an operational need to deviate from the Monday through Friday work week with Saturday and Sunday as rest days. Moreover, the Carrier never even addressed the issue of the improper rest day assignment other than to state it was free to manage its business as it sees fit absent "some legislative restraint or contractual limitation". It is obvious that this Carrier has no regard with the clear and unambiguous language of the Agreement because Rule 28, cited by the General Chairman, clearly does limit the Carrier in the assignment of rest days other than Saturday and Sunday. Rule 28(c) states:

> "28(c) General. The carrier will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this agreement, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday."

In this case, the Carrier was clearly challenged by the Organization from the very inception of this case to show an operational requirement that would allow it to bulletin positions at Lexington, Kentucky with rest days other than Saturday and Sunday. Up until the time this dispute arose, all Maintenance of Way activity was performed on a five (5) day a week basis in accordance with Rule 28(d), which reads:

> "28(d) Five-day positions. On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday."

Throughout the entire handling of this case, the Carrier never addressed the issue of an operational requirement prior to changing employes' rest days. Although the Carrier alleged that the Claimant assumed the rest days of the new assignment, i.e., Monday and Tuesday, he did so in accordance with this Board's advice of "obey now and grieve later". This is exactly what the Claimant did. In other words, he accepted the assignment and filed the instant claim. Since, the Carrier failed to show an operational requirement prior to changing the Claimant's rest days from Saturday and Sunday to Monday and Tuesday, it violated Rule 28 of the Agreement. Hence, the Majority made a grievous error when it failed to sustain Part (2) of the claim. With the Majority's

blessings, the Carrier's assignment of rest days other than Saturday and Sunday obviously violated the clear rules of the Agreement. This Board is empowered to interpret the language of the Agreement, which it certainly did not do in this instance much to the detriment of the Claimant and the integrity of the Agreement. Inasmuch as the findings of this award were not drawn from the essence of the Agreement and applicable Board precedent, it stands as an anomaly and worthless as precedent.

Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member