NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29864
Docket No. MW-29928
93-3-91-3-305

The Third Division consisted of the regular members and in addition Referee John C. Fletcher 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 established the assistant foreman flagging positions advertised in Bulletins B-1098 and B-1099, dated February 14, 1990, with work weeks of four (4) days of ten (10) hours each with Wednesday, Thursday and Friday (B1098) and Sunday, Monday and Tuesday (B-1099), respectively, as assigned rest days beginning on February 22, 1990 and March 5, 1990, respectively [System File 14(4)(90)/12(90-535) LNR].

(2) As a consequence of the aforesaid violation:

(a) Claimant P. R. Knowles shall be allowed two (2) hours' pay for each of his assigned work days at his time and one-half overtime rate of pay and eight (8) hours' pay for each Tuesday at his pro rata straight time rate of pay; and

(b) Claimant I. W. Owens shall be allowed two (2) hours' pay for each of his assigned work days of Saturday, Monday and Tuesday at his time and one-half overtime rate of pay and eight (8) hours' pay for each Sunday at his time and one-half overtime rate of pay; and

(c) The aforementioned positions shall be abolished and re-established in accordance with Rule 28."

FINDINGS:

The Third 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.

Carrier utilized the services of an outside contractor for the cleaning and painting of Bridge No. 188 over the Tensaw River, Hurricane, Alabama. It was necessary to provide flagging protection ten hours per day, seven days per week, while the project was being completed. Carrier advertised two positions; one to work four ten hour days, Saturday through Tuesday and the other to work three ten hour days, Wednesday through Friday. The Organization filed claim contending, inter alia, that Rule 28 of the Agreement was violated when the two assignments were bulletined to work other than an eight hour, five day per week schedule. Carrier defended against the claim on the basis, inter alia, that workweek assignments of four ten hour days are commonplace on this Carrier, and to be established, only requires the concurrence of the affected employees.

Rule 28, Basic Day and Work Week, is the operative contract provision in this matter. Rule 28 had its genesis in the 1949 Forty Hour Week Agreement and contains language which is standard in this industry. Paragraph (c) of the Rule provides:

> "28(c) General. The carrier will establish, effective September 1, 1949, for all employees, 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 will be Saturday and Sunday. The foregoing work week rule is subject to the provisions of the agreement which follows:"

None of the exceptions mentioned elsewhere in the Rule, deal with the situation here, working less than five days per week and more than eight hours per day. Each of the noted exceptions clearly pertains to limited deviations, such as non consecutive rest days, staggered workweeks, deviation from a Monday-Friday workweek, etc. But all of the exceptions involve workdays consisting of

eight hours. There is nothing in the language of Rule 28 which can be read as encompassing a workweek of ten hour days. Accordingly, if a ten hour, four day workweek is to be established, it may only be done under the provisions of another rule or with the concurrence of authorized representatives of the Organization. It cannot be established merely with the concurrence of the affected employee, as this would be an affront to the collective bargaining process and undermine basic purposes of the Railway Labor Act - Carriers and accredited Representatives negotiate Agreements for the members of a craft or class on a system-wide basis.

Carrier in its Submission has not pointed to any Rule which specifically authorizes bulletining assignments with four ten hour days. Nor has it demonstrated that it had the concurrence of an authorized representative in bulletining the two flagging assignments to work such a schedule. Instead, it attempted to demonstrate through a convoluted reading of uncomplicated language that Rule 28 should be read in other than its clearly stated terms, as well as making generalized statements that it has innumerable positions in its workforce which are assigned ten hour days. Further, a number of prior Awards, involving claims that it was improper to work a particular employee four ten hours days, in which the Organization did not prevail, have been cited as authority for its action here.

The first of these is Third Division Award 24265 and concerns the reassignment of a Welder to work with a Rail Gang at Tallahassee, Florida, temporarily assisting Welders regularly assigned to that gang. Previously the Welder had worked five eight hour days per week. When he was assigned to assist the Rail Gang his workweek was changed to four ten hour days. The Rail Gang was working this schedule under the terms of an April 13, 1971 Memorandum of Agreement providing in part:

> "That in the application of Rule 38, Section I, System Forces, in making up time for the purpose of accumulating rest time for longer consecutive rest periods, may elect under the provisions of this Section to work up to ten (10) hours on any calendar day to the extent that the total hours worked in each half month, at no additional expense to the Company, are the equivalent of the straight-time work hours therein."

In rejecting the Organization's claim the Board concluded that the practice on the property demonstrated that numerous Welder and Welder Helpers had there workweeks altered in the past when working

with gangs. Further that the language of the 1971 Memorandum Agreement prevailed over the Forty Hour Week Rule.

Award 24265 lacks authoritative precedent here for two reasons. First, Carrier, in this case, has not relied upon a Rule or Agreement containing language similar to that contained in the 1971 Memorandum of Agreement. The 1971 Agreement is clearly an exception to the Forty Hour Week Agreement. Second, the Flagmen Claimants here were not assigned to work with a gang that was accumulating rest time, the situation in Award 24265.

The Third Division Award 24330, relied upon for support of Carrier's actions here, concerns the claim of an Apprentice Foreman who was regularly assigned to work five eight hour days, Monday through Friday. Like the situation in the earlier case, the Claimant in Award 24330 was assigned to work with a Floating Gang which was working under a "make-up time" schedule under Rule 38 of Carrier's predecessor Seaboard Coast Line Agreement. Section 2 of Rule 38 specifically provided that all men in the gang (Foremen included) must observe the same hours. Award 24230 is not authority in this case because the two flagging assignments were not working with a floating gang that was operating under the provisions of a Rule similar to Rule 38. The flagging assignments were providing protection for the forces of an outside contractor.

The third decision relied upon, Third Division Award 26996, also involved reassignment of eight hour day, five day per week employees to work four ten hour days. In the final paragraph of the Findings, the Board stated:

> "In Third Division Awards 24330 and 24265 we addressed the issues raised in this matter concerning the Carrier's modifications of the hours the stationary forces to coincide with the hours worked by floating forces in light of the language found in the April 13, 1971 Memorandum Agreement and the existence of a practice of doing so. We find nothing in this record to cause a different result."

Here again the situation is different. The flagging assignments were not placed on a workweek of four ten hour days to harmonize their hours with the schedules being worked by Carrier's floating forces. All three of these earlier decisions seem to have constructively placed the regular employee who was temporarily reassigned to the floating forces as a member of the gang which was working a schedule which deviated from the basic forty hour week schedule.

The fourth decision, Third Division Award 28814, involved questions concerning the establishment of work schedules for a floating gang. At issue was the scope of Carrier's authority under Rule 38. Inasmuch as the two assignments under review here were not argued to have been established under Rule 38, nor were they assigned to work with a floating gang that was established with a workweek as provided in Rule 38, the Award simply lacks precedent in the instant case.

Thus the evidence demonstrates that Carrier has license to establish floating gangs with workweeks that deviate from the explicit provisions of the Forty Hour Week Agreement, Rule 28. This authority is conveyed to Carrier by the terms of the "Make-up Time" provisions in the Agreement. Further, the evidence demonstrates that a practice is in place whereby it was not an Agreement violation to assign Foreman and Welders to temporarily work with a floating gang and have the employees so assigned change their workweeks from five eight hour days to four ten hour days so as to work the same schedule as the gang. But there is no evidence that Carrier is privileged to do so in any other circumstances.

It is Carrier that bulletined two assignments that deviated from the explicit provisions of Rule 28. When these assignments were challenged and the Organization was able to demonstrate that they were not proper under Rule 28, Carrier then had the burden of demonstrating that some other Rule applied or that a proper exception existed. Carrier has not satisfied this burden. The Claim has merit.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.