Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28214
THIRD DIVISION Docket No. MW-27839
89-3-87-3-352

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Elgin, Joliet and Eastern Railway Company

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

(1) The Agreement was violated when the Carrier did not call Motor Car Repair Foreman R. Guzman to perform overtime service in connection with the supervision of three motor car repairmen on September 8, 26, 29 and 30, 1985 (System File SG-6-85/WM-15-85).

(2) The claimant shall be compensated as set forth within the initial claim as follows:

> 'This claim is being submitted on behalf of R. G. Guzman (66238). On September 8, 1985 for 8 hours at time and one-half for his regular rate of pay plus time and one-half for his regular shift on September 9, 1985. On September 26, 1985 for 6 hours at time and one-half his regular rate of pay, plus time and one-half for his regular shift on September 27, 1985. On September 29, 1985 for 8 hours at time and one-half his regular rate of pay, plus time and one-half for his regular shift on September 30, 1985. On September 30, 1985 for 8 hours at time and one-half his regular rate of pay, plus time and one-half for his regular shift on October 1, 1985.'"

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 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.

Rule 4(c) provides:

> "(c) An employe reporting directly to the Manager-Work Equipment and/or the Assistant Supervisor-Work Equipment who is assigned to the assisting of either of said officials in the supervision and direction of the work of motor car repairmen and garage service men as well as the performance of other work of the Scales and Work Equipment Sub-Department shall constitute a Motor Car Repair Foreman."

In its claiming letter of October 7, 1985, the Local Chairman contended:

> "It has been a practice of the Gary Garage that if 3 or more men are working without a foreman a foreman will be called. On the following dates the following men worked in the Gary Garage without a foreman."

On December 6, 1985, the Manager-Scales & Work Equipment, declined the Claim stating, inter alia:

> "Having reviewed the above rules outlined above for violation, I find no rule support for your claim. In regard to the employment of a motor car repair foreman, when working three or more men, company records will indicate that this is not an established practice. Motor car repair foremen are used when their expertise and/or supervision are required without regard to number of employees working a given shift."

On January 28, 1986, the General Chairman asked the Manager-Scales & Work Equipment to reconsider pointing out that in a similar Claim three years earlier the Supervisor had written:

> "I am in receipt of your letter received at the office of Division Engineer, Gary, Indiana, in which you are requesting reimbursement to Foreman R. G. Guzman, Account No. 66238, for sixteen (16) hours at time and one-half, three (3) hours at two times his regular Foreman's pay rate for March 14, 1982, and eight (8) hours at time and one-half for continuous overtime for March 15, 1982.
>
> Company records indicate that Mr. Curtis did work on March 14, 1982, bringing the Gary garage work force to 3 employees. I also realize that it has long been past practice to work a Foreman when three or more employees are working. However, there were only three employees on the property working for three and one-half (3 1/2) hours and, therefore, beyond this period

> the services of a garage foreman would not be warranted. I, too, realize that had he been called out to work the overtime that he undoubtedly would have been kept eight (8) hours. As a result, I am placing your claim in line for payment for eight (8) hours at one and one-half times the Foreman's regular pay rate to comprehend the loss due to not being called. The balance of your claim is excessive and entirely without merit and is therefore denied."

In subsequent correspondence Carrier argued:

> ". . . there is no rule of our Agreement, including those cited, which requires the Carrier to utilize a motor car repair foreman when three or more employes are working."

At a later conference Carrier furnished 12 Daily Reports of Labor to establish three or more men worked on various dates without a Foreman and without objection or Claim. On October 30, 1986, the Organization responded the reports did not show the hours worked so that it couldn't be determined how many of the employees were working at the same time. Apparently no answer to this contention was ever made. On March 6, 1987, the Organization forwarded to the Director of Labor Relations a statement from a Motor Car Repair Foreman reading:

> "This is to verify that is has been past practice for a Foreman to be called out whenever there were three or more men working in the garage MCR or CSM at Gary Kirk Yard.
>
> /S/ Jesse B. Weldon"

A substantially similar statement from an Assistant Foreman was also forwarded.

On March 12, 1987, Carrier responded that it used Foremen when it felt the need and no Rule states when a Foreman must be assigned. It further contended the allowance of a single Claim at the initial level in 1982 did not set a precedent.

Before this Board Carrier argues it has the right to determine the size of its workforce unless limited by the Agreement. Further, even if there had been a practice, the practice would have to yield to the clear and unambiguous Agreement language.

We may agree with Carrier that a past practice must yield when it is in conflict with clear and unambiguous Agreement language, but we see no such conflict here. We can find no tension between Rule 4(c), or any other cited rule and a practice of calling a Foreman when three employees are working. The Agreement neither requires nor prohibits such practice -- it is silent on the question.

The concept of past practice is no stranger to the field of industrial relations generally or to this division in particular. Thus in Third Division Award 5167 we held:

> "The record shows that it has long been an established practice for the Carrier to allow clerical employes in the office of the Auditor Freight Accounts, St. Louis, Missouri compensation at their regular rates of pay on days when they are absent from their work because performing jury service or serving as judges or clerks of elections, provided; it was not necessary for the Carrier to fill their assigned positions on those days and that Carrier was not put to any additional expense by reason of the employes being absent therefrom. This practice had become a part of their working conditions.
>
> As stated in Award 2436 of the Division: 'It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties.'"

Again, in Third Division Award 18548 we stated:

> "*** The Rules do not clearly and unambiguously preclude such payments as Carrier contends. Since the Agreement does not shed any light on the intent of the parties, we must ascertain this intent from past practice.
>
> Carrier hes (sic) not refuted the Organization's allegation that the practice of paying for noon meals while employes were away from their assigned home station though returning later on in the day, has existed for at least twelve years. Rather, they claim it was an error on their part which can be terminated at will. We disagree. A past practice of at least twelve years duration clealy (sic) indicates the intent of the parties, absent any contractual prohibition. And since the Agreement is silent on this point, the past practice becomes the Rule. If Carrier desires to change this practice, it can seek power to do so at the bargaining table. We are without power to do so. Consequently, we must sustain the claim."

This Board does not view the 1982 Claim settlement at the initial level as precedent for us to follow. However, we cannot close our eyes to the factual admissions made in the correspondence regarding that case. Those admissions coupled with the statements submitted by the Organization constitute persuasive evidence of a past practice. That evidence is not rebutted by

Carrier's Daily Reports of Labor, especially in view of Carrier's failure to respond to the objection that the records do not establish which shift the various employees worked. While the record does not establish the duration of the practice it does show that as of May, 1982, it had "long been past practice." Thus it was more than an isolated or unusual incident which would not give rise to an enforceable practice.

In the recent Third Division Award 26438 this Board held:

> "On April 1, 12, 13, 20 and 27, 1984, the Carrier utilized a Welder and Welder Helper to perform work on an overtime basis. Claimant, a Welder Foreman, was not called to direct this work. After the Claim was declined at each step on the property, Claimant individually instituted proceedings before this Board on May 23, 1985.
>
> Claimant maintains that he is entitled to compensation because the Welders who performed the jobs in question were supervised by other supervisors, when the supervisory work should have been assigned to Claimant as Senior Welding Foreman.
>
> After careful consideration of this matter, the Board must reject Claimant's contentions. This Board has consistently held that, unless otherwise specifically provided in the Agreement, Carrier has the sole and exclusive right to determine when and under what circumstances a foreman is assigned to supervise a group of employes. The burden of proof is on the Claimant to show that some Rule of the Agreement has been violated. The Claimant in the instant case has failed to sustain that burden. Accordingly, we must deny the Claim."

Carrier relies heavily on this case but we believe that reliance is misplaced. A careful reading of the Award gives no indication there was an assertion, much less proof, of a past practice upon which the Claim was based. While we agree entirely with the result in Third Division Award 26438, we do not believe it applies here nor do we agree other cases relied on by Carrier dealing with management's undoubted right to determine the complement of its workforce, including the assignment of supervisors are applicable. In the case at hand Claimant, a foreman, is a member of the collective bargaining unit and is entitled to the benefits secured for him by the terms of the Agreement, including those established by the practice of the parties in interpreting and implementing it.

We find a practice of calling in a Foreman when three employees were working at the garage existed and that this practice does not contradict or

conflict with any Agreement Rule. Therefore we will sustain the Claim, but in doing so we will note we agree with Carrier that the Claim as presented is excessive in that it requests overtime payments on dates they would not have been due. We believe the proper remedy is to Award Claimant the amount he would have earned had he been called in on the Claim dates.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 28214, DOCKET MW-27839
(Referee Cloney)

The lengthy Majority opinion might mislead the reader into believing that a difficult and complex issue was involved in the dispute. Not at all. The issue was quite simple, namely, whether the Carrier had the right to determine whether it would assign supervision over a motor car repair force. The decision should have been equally simple, namely, the Carrier had the right to determine whether it would assign supervision absent an Agreement which limited that right.

The six page opinion of the Majority comes to the astounding conclusion that while there is no Agreement limiting the Carrier's prerogative of deciding whether a supervisor is required, the alleged existence of a past practice by the Carrier of assigning a supervisor requires it to continue to do so. In other words, the Carrier's exercise of a right of management prerogative has destroyed the prerogative.

The Majority's treatment of Third Division Award 26438 is worthy of note. That Award involved the same parties to this dispute, the same Agreement, and the same issue. The Board concluded:

> "This Board has consistently held that unless otherwise specifically provided in the Agreement, Carrier has the sole and exclusive right to determine when and under what circumstances a foreman is assigned to supervise a group of employes. The burden of proof is on the Claimant to show that some Rule of the Agreement has

been violated."

The Majority reveals a total lack of understanding of Award 26438 by dismissing its relevance on the ground that:

> "A careful reading of the Award gives no indication there was an assertion, much less proof, of a past practice upon which the Claim was based."

The Majority is correct that the Board in Award 26438 did not investigate past practice but totally misses the point of the reason there was no investigation. There was no inquiry of past practice because, lacking any Agreement support or, at the least, some ambiguity in the Agreement which makes past practice significant in interpreting the ambiguous Agreement, the past practice of the Carrier was totally irrelevant.

We are confident that the Majority decision will be given no precedential weight. Indeed, we believe that its main utility in the future will be that of a prime example of the term "palpably erroneous."

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost