Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28814
Docket No. MW-28385
91-3-88-3-153

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard System Railroad)

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

(1) The Carrier violated the Agreement when it required employes assigned to System Rail Gang 5X11 to work on Sundays beginning on or about Sunday, August 17, 1986 and compensated them at their respective straight time rates instead of their time and one-half overtime rates for the work they performed on each Sunday [System File 37-SCL-86-46 (Joint)/12-29(87-34) Q].

(2) As a consequence of the aforesaid violations, the employes assigned to System Rail Gang 5X11 shall be allowed the difference between their respective straight time rates and their time and one-half rates (i.e., one-half time) for all work performed on Sundays beginning Sunday, August 17, 1986 and continuing until the violation is corrected and Sundays shall immediately be excluded from their regularly assigned work schedule."

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.

On June 20, 1986, the Carrier issued Bulletin Nos. 38-01, 39-10, 40-01, 41-01, 42-01, 43-01, 15-33, 16-33, 17-33 and 32-55, advertising various positions in System Rail Gang 5X11. The aforementioned bulletins contained a note which read:

> "Work period will consist of consecutive days until hours for period are completed in each work period."

Copies of the bulletins were received by the Organization on July 8, 1986. On October 15, 1986, the Organization filed the instant claim, alleging that Rail Gang 5X11 had historically worked ten (10) hours per day at the straight-time rate of pay, excluding Sundays, until all straight-time hours had been accumulated for that respective pay period. According to the Organization, Sundays have always been considered as rest days for all rail gang employees with the exception of cooks assigned to this force.

Moreover, the Organization contends that by requiring the members of System Rail Gang 5X11 to work a continuous workweek, including Sundays, Carrier failed to afford the employees an opportunity to vote on whether or not a majority wished to do so, in violation of Rule 38, which states as follows:

"RULE 38

MAKE-UP TIME - WEEKEND VISITS HOME

Section 1

Employees stationed in camp cars will be allowed, when in the judgment of Management conditions permit, to make weekend visits to their homes. If employees cannot by using regular train service after completion of work on the last day of the work week, arrive home within a reasonable time and return to their camps on the first day of the succeeding work week in time for regular service, they will be allowed to make up time during the week in order to do this, provided not more than two (2) hours shall be made up on any one day and at no additional expense to the Company. Free transportation will be furnished over Company lines where service is available, consistent with the regulations of the Company, and any time lost on this account will not be paid for. The total time worked each day must be recorded in the time book on the day worked.

NOTE: In the application of Rule 38, Section 1, System Forces, in making up time for the purpose of accumulating rest time for longer consecutive rest periods, may elect, under the provisions of Section 3, to work up to ten (10) hours on any calendar days 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. When a holiday falls on a regularly scheduled work day, a maximum of thirty (30) minutes per day over the regular 10-hour day may be worked up to a total of two hours in any one pay half, provided suitable working hours are available.

Section 2

Stationery (sic) forces working in conjunction with District floating forces may be requested to work the same hours as District floating forces. In this event, change in the work hours must be handled in accordance with Section 3 of this rule.

Section 3

All the men in the gang must observe the same hours. The wishes of a majority of the men in the gang (the Foreman included) shall prevail on the question of working make-up time. Any make-up time is subject to the concurrence of the Division Engineer or Engineer of Bridges."

It is the Organization's view that Carrier may not establish continuous work day gangs without the employees' consent, and that the unilateral implementation of such a work schedule did not meet with the approval of a majority of the members of the gang, as evidenced by statements signed by the members of the gang and attached to the claim. Thus, the Organization stresses, Carrier's schedule would not have been accepted by a majority of the members of the gang, and Carrier was aware that such was the case.

Finally, it is argued that Carrier has attempted herein to make agreements with individual members of System Rail Gang 5X11; that is, each of the members of the gang entered into what the Organization terms an "implied contract" to work a schedule in contravention of the Agreement. Such arrangements are impermissible, the Organization maintains, as established by numerous precedent Awards on the subject.

Carrier advances two arguments in support of its contentions that this claim should be rejected. First, it submits that the claim is untimely and should be dismissed as it is procedurally defective. Second, on the merits, Carrier argues that it maintains both the prerogative and the obligation to determine the most efficient utilization of its facilities, manpower and equipment so long as it has not restricted itself by agreement. In this case, Carrier maintains that the right to work the gang in the manner bulletined is expressly recognized in Rule 38. To argue, as the Organization does, that the employees on the gang do not like working on Sundays, is immaterial, Carrier stresses. All of these employees freely elected to bid on the advertised position with full knowledge of the gang's work schedule. Carrier points out that had the employees been truly dissatisfied with working the schedule bulletined for System Gang 5X22, they could have bid to alternative positions in their respective divisions.

Turning first to the procedural objection raised by the Carrier, the Board finds, based upon the record evidence, that the bulletins were indeed received by the Organization on July 8, 1986. The Organization has conceded that fact in its correspondence during the handling of this dispute on the property. If that were the only piece of evidence relevant to this issue, we would agree with Carrier that the claim, filed October 15, 1986, is well beyond the 60-day time limit prescribed in Rule 40, Section 1 of the parties' Agreement.

However, there are additional pertinent facts in the record which compel the conclusion that Carrier's objection is not well taken. In a January 8, 1987 letter to the Director of Labor Relations, the General Chairman reviewed the sequence of events that had taken place prior to the filing of the claim. He stated that, after receiving the bulletins at issue, he met with Carrier representatives on July 9 and 23, 1987, in an attempt to resolve the problem. At those conferences, the General Chairman noted that the "Carrier was advised that if it did put the Sunday work requirement in effect when this gang was re-established and commenced work," the Organization would handle the matter under the claims and grievance procedure.

Under Rule 40, Section 1, claims must be filed within "60 days from the date of the occurrence on which the claim or grievance is based." In this case, the gang was re-established on or about Sunday, August 17, 1986, and the Sunday work requirement put into effect. That is the "occurrence" upon which the claim is based. We agree with the Organization that when the bulletins were issued, the event itself, that is, the Sunday work requirement, was still inchoate. The parties tried, unsuccessfully, to forestall the filing of a claim, but no resolution was reached. Once the gang commenced its work schedule on August 17, 1986, that triggered the alleged violation of the Agreement, and a claim could be filed timely within 60 days thereof. The October 15, 1986 filing of the present claim falls within that time period, and therefore Carrier's timeliness argument must be rejected.

Turning to the merits, it is our view that Carrier acted in conformity with the provisions of the Agreement and, absent any proven Rule violation, this claim fails on the merits. As we read the plain language of Rule 38, Carrier is expressly permitted to act as it did in this dispute. The first sentence in Section 1 specifically recognizes that employees may make weekend visits to their homes, but only "when in the judgment of Management conditions permit ...." In this case, Carrier notified employees at the outset of the terms and conditions of the bulletined jobs. The Sunday work requirement was one of those conditions, and neither Rule 38 nor any other Rule referred to by the Organization constitutes a direct prohibition to such action.

The Organization's reliance upon past practice is unavailing. Here, beyond the Organization's naked assertion of historical practice, we find no specific evidence which would lend support to its claim. Moreover, it is well established that past practice, even if proven, cannot supersede unambiguous contractual language. Under Rule 38, employees have no guarantee of Sundays off; it is left to Management to make that determination as conditions permit, and the Organization's unsupported allegations of practice cannot vary those clear terms.

We also reject the Organization's claim that Carrier made "side" agreements with individual employees in violation of the Agreement. Having found that Carrier acted properly in scheduling its work force in the manner it did, it necessarily follows that there were no impermissible side deals.

Finally, we concur with Carrier when it contends that the evidence proffered by the Organization, purporting to show that the majority of employees on the gang did not "like" working on Sundays, is of little relevance. As we read Rule 38, the majority of the employees may elect to make up time for the purpose of accumulating rest time. However, the fact that employees may voluntarily agree to alter their work schedule does not dismiss or affect Carrier's right to schedule work in the first instance. That is what is at issue here, and the employees' likes or dislikes have no bearing upon the contractual question posed. On that issue, we find that the Organization has failed to meet its burden of proving that the Carrier violated the Agreement by requiring employees to work Sundays at the straight time rate, and the claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.