Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37844
Docket No. MW-37224
06-3-02-3-194

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when on May 5, 2000 it abolished Montana Seniority District 200 mobile welding positions working in conjunction with Switch Grinders PJ-8 and MC-3 assigned to Welding Foreman E. Golgade, Head Welder D. Pulse, Grinder Operators J. Doohen and F. Music and re-established these mobile positions effective July 10, 2000 as head quartered at Havre, Montana and assigned to junior Montana Seniority District 200 employes S. Lumsden, R. Biem, B. Borst and P. Youngbauer. (System File B-M-791-H/11-00-0498 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimants E. Goldade, D. Pulse, J. Doohen and F. Music shall now '. . . receive any pay differentials to which they would be entitled from July 10, and continuing. We request that each Claimant receive pay equal to any and all overtime paid the positions improperly headquartered at Havre, beginning July 10. We request that Claimants receive the $21.50 meal per diem for each calendar day beginning July 10. We request that Claimants receive a payment of 5% for any and all earnings paid the employes on the positions while headquartered at

Havre. We request that Claimants receive payment for any unreimbursed week-end travel they incur beginning July 10. This claim is to continue until such time as the positions improperly headquartered in Havre are abolished and properly reassigned as mobile positions.'"

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 were given due notice of hearing thereon.

The Claimants were assigned to a mobile welding gang on February 15, 2000 and worked in conjunction with a contractor's grinding machine crew. Mobile crews of this type generally work over sizeable portions of the Carrier's territory. As a result, the crews live away from their homes during the workweek and receive per diem meal and lodging allowances in accordance with the provisions of Rule 38 of the Agreement. The Organization asserts that there is a long and well-established practice of establishing mobile crews to work with subcontracted switch grinders across the Carrier's territory.

On May 5, 2000, the Claimants' positions were abolished. Several months later, a welding crew was established with a fixed headquarters at Havre, Montana, on former District 20. The Organization points out that headquartered positions are assigned on a prior rights basis. The Claimants did not possess prior rights on former District 20 and, therefore, junior employees with prior rights were assigned to the headquartered positions.

According to the Organization, the headquartered crew then proceeded to perform the same type of service as the mobile welding crew that had been abolished. The crew was required to live away from home throughout the regular workweek throughout the period of their assignment as they performed work across Montana District 200. Under these circumstances, the Organization contends that the positions were de facto mobile gangs.

Based on the foregoing factual predicate, the Organization argues that the Carrier has not complied with its contractual obligations in several ways. First, the Organization contends that the mobile welding crew should have been programmed to work for six months, yet the Carrier abolished the crew positions prior to that time. Had the Carrier complied with the Agreement, the Organization submits, the mobile positions would have worked on Montana District 200 through August 28, 2000.

Second, the Organization argues that the abolishment of the mobile crew and the establishment of the headquartered crew was a change in name only, because the service provided by the headquartered crew clearly was mobile in nature. The gang in Havre performed exactly the same work under the same travel conditions as the mobile crew, except with a fixed headquarters location. In the Organization's view, the Carrier should not be permitted to alter the conditions of service simply by designating a mobile position as a headquartered position.

Third, the Organization maintains that the Carrier's actions were a deliberate attempt to circumvent seniority rights and payment of the benefits accruing to mobile crew positions. In particular, the Carrier's improper conduct divested the Claimants of the opportunity to continue qualifying for the production incentive bonus specified in Section 5A of the August 12, 1999 Agreement. This provision stipulates that each employee assigned to any district mobile gang who does not leave the gang voluntarily for a period of six months is entitled to a lump sum payment annually equal to 5% of his or her compensation earned during the calendar year on that gang. In the Organization's view, the Carrier's decision to improperly re-bulletin the mobile welding crew positions involved here as headquartered positions deprived the Claimants of the opportunity to continue accruing additional entitlement toward the 5% production incentive payments.

The Carrier argued on the property that the employees in this case were properly headquartered and correctly compensated for any time spent away from home. No seniority rights have been violated, the Carrier further argued. It insisted that the headquartered gang was not established in order to deprive the employees of benefits. On the contrary, the headquartered gang was paid full benefits when not at its headquarters and, therefore, no benefits have been lost. Perhaps more fundamentally, however, the Carrier asserted that it is not prevented from determining which gang best suits its needs for particular work assignments. Because the Organization has not established that any Agreement provisions specifically prohibit the Carrier from acting as it did, this claim must be denied.

The Board finds that resolution of this claim turns on the specific Agreement language relied upon by the Organization. We first turn to Section 5A of the August 12, 1999 Seniority District Consolidation Agreement. This provision states:

> "A. Each employee assigned to any district mobile gang who does not leave the gang voluntarily for a period of at least six (6) months shall be entitled to a lump sum payment annually equal to 5% of his/her compensation earned during the calendar year on that gang. Such compensation shall not exceed $1,000 and shall be paid within 30 days of the completion of the employee's service on the gang; for mobile gangs not required to be disbanded each year, payment will be made within 30 days of the completion of each calendar year. If the company disbands the gang in less than six months, the company will be responsible for payment of the production incentive earned as of that date."

To the extent that the Organization argues that the foregoing language restricts the Carrier's ability to abolish mobile gangs in less than six months, we find the contention unpersuasive. There is no language of limitation in Section 5A that would restrict or prohibit the Carrier from abolishing a district mobile gang at any time. Indeed, the last sentence of Section 5A specifically contemplates that the Carrier may disband a gang in less than six months, provided that a pro rata payment of the production incentive bonus is made.

We next turn to the provisions of the Award of Arbitration Board No. 298 and Interpretations 12 and 13, also relied upon the Organization as the basis for this claim. Arbitration Board No. 298 defines mobile employees as those "who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels. . . ."

Interpretation No. 12 states as follows:

> "Question: Carrier practice over a period of many years has been to provide camp cars for gangs but camp car rules in effect do not make it mandatory that cars be provided. Employes assigned to such gang are recruited from an entire seniority district and work away from home while assigned to the gang.
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> May Carrier discontinue providing camp cars and escape payment under I-A-3?
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> Answer: This question requires a determination as to whether or not the employees involved are to be provided for under Section I of the Award. Section I applies to all employees 'who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels.'[1]
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> The 'Opinion of the Neutral Members' issued concurrently with the Award on September 30, 1967, includes the following pertinent language in further defining the employees contemplated as provided for in Section I:
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> > 'The employees involved are primarily maintenance of way employees who are engaged in the construction, re-construction, maintenance, and repair of the roadway bridges, buildings, and other structures and the signalmen

[1] The language defining mobile positions was incorporated into the Agreement as Rule 38.

who perform similar services in connection with the signaling devices and systems.'

The Memorandum of Board Conference issued by the full Board on September 30, 1967, included the following:

'1. It was decided by the Board that the provisions of Section I shall not apply to employees where the men report for duty at a fixed point, which remains the same point throughout the year.'

The Carrier seems to contend that these employes are now subject to Section II of the Award rather than Section I.

With regard to Section II employees the following language from the 'Opinion of the Neutral Members' is pertinent:

'Section II of the award deals primarily with problems arising out of relief service, although not limited thereto. Within the area of relief assignments three general categories are involved and these are: (1) regular assigned employees diverted from their regular assignment to perform relief service; (2) regular assigned relief employees who provide relief on a scheduled basis to fill in on the rest days of regular employees; and (3) extra employees who provide relief on an irregular unscheduled basis as the need of the service may require.'

An employee cannot be transferred from coverage of Section I into Section II merely by the discontinuance of camp cars and/or the designation of a headquarters point.

In applying the foregoing principles and guidelines to the specific question at issue here, it is clear that the employees are in a type of service contemplated within the coverage of Section I. The Carrier may discontinue providing camp cars but may not escape payments

under Section I except in locations where the men report for duty at a fixed point which remains the same point throughout a period of 12 months or more."

Interpretation No. 13 states as follows:

"Question: Carrier's practice over a period of many years has been to provide camp cars for gangs performing work over an entire seniority district or the entire railroad. Employes assigned to such gang are recruited from the entire seniority district or the entire railroad and work away from their homes while assigned to the gang.

May Carrier discontinue providing camp cars, establish a fixed location as headquarters for the gang, changing the headquarters location as work progresses over such seniority district or the entire railroad and escape payment under I-A-3

Answer: This question is answered by Interpretation No. 12."

The Organization argues that the foregoing provisions recognize that the Carrier cannot designate a headquarters point for the sole purpose of evading benefits accruing to mobile positions. After carefully examining the language relied upon from the Award of Arbitration Board No. 298 and the Interpretations in the questions and answers cited above, we do not agree that the language should be interpreted in the manner suggested by the Organization. Nowhere does the Award of Arbitration Board No. 298 impede the Carrier's right of management in organizing its forces into gang structures fitting the Carrier's particular needs at any given time. Similarly, the Interpretations of the Award cited by the Organization are inapposite to the case at bar. They dealt with a dispute as to whether a carrier could decline to provide lodging for a gang that would today be called a mobile gang. In that instance, the carrier apparently refused lodging expense benefits to an existing mobile gang; it had not abolished that mobile gang, nor had it created a fixed headquarters gang.

The Carrier has the right to determine which gang type best suits its needs in particular work assignments and that right is altered only to the specific extent of the Agreement. The Organization failed to establish that the cited contractual provisions prohibited the Carrier's actions in this instance. Nor are we convinced that a past practice restricts the exercise of the Carrier's management functions. The principles with regard to whether a past practice can trump management's methods of operation or direction of the workforce are well established in labor relations. In Esso Standard Oil Co., 16 LA 73, 74 (McCoy, 1951) it was stated:

> "But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties have themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. . . . Mere non-use of a right does not entail a loss of it."

That conclusion was echoed in Fort Motor Co., 19 LA 237, 241-241 (Shulman, 1952):

> "A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. . . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
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> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. . . ."

Regardless of whether the Carrier has previously used mobile gangs to work with switch grinders, it is not prohibited from using headquartered crews where

circumstances warrant. While the Carrier's inherent rights are not unfettered, they must be respected in the absence of evidence that the Carrier acted arbitrarily or without good faith. Here, we reject the Organization's assertion that the Carrier intentionally switched crews to avoid payment of benefits negotiated for mobile crews. The headquartered positions were compensated for time spent away from home and they were appointed in the exercise of seniority according to the parties' Agreement. No bad faith is suggested under these facts.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of August 2006.