

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30833
Docket No. SG-31170
95-3-93-3-37

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago & North Western Transportation Co. (CNW):

Claim on behalf of D.J. Zimmerman for payment of 43.5 hours at the time and one-half rate and 40 hours at the half time rate account Carrier violated the current Signalmen's Agreement, particularly Rules 15(d) and 16(a), when it utilized a junior employee to perform service in connection with storm repairs starting October 31, 1991, and denied the Claimant the opportunity to perform the work. Carrier's File No. 79-92-6. General Chairman's File No. S-AV-64. BRS File Case No. 8944-CNW."

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.

The Claimant in this case was regularly assigned as a Lead Signal Maintainer with headquarters at Tama, Iowa. He was responsible for signal maintenance in the Tama - Belle Plaine territory. At Belle Plaine, Iowa, a Signal Maintainer was regularly assigned. Together these two employees handled the signal maintenance in the Tama - Belle Plaine territory.

On October 31, 1991, a severe ice storm caused substantial damage to Carrier's pole lines in the territory between Ogden and Carroll, Iowa, which is outside of the territory of the Tama - Belle Plaine maintainers. To assist in the repairs to the pole lines, Carrier used the Maintainer from Belle Plaine to augment the Ogden - Carroll forces. This required the Belle Plaine maintainer to work outside of his territory beginning November 3, 1991, and continued through November 9, 1991. During this period, the Claimant Lead Maintainer remained on his regular assignment at Tama and covered the necessary signal maintenance work in the Tama - Belle Plaine territory. Because the Claimant had greater seniority than did the Belle Plaine maintainer, a penalty claim was presented on behalf of the senior employee alleging that he should have been afforded the opportunity to perform the overtime work which was performed by the junior maintainer. There is no disagreement between the parties relative to this fact situation.

The Organization in their presentation and progression of the dispute alleged that Carrier was in violation of Rules 15(d) and 16(a) of the rules agreement because of their use of the junior employee to perform the overtime service without first giving the senior employee the opportunity to perform the overtime work. The Organization cited with favor the decisions rendered by Third Division Awards 5346, 14161 and 19758 in support of their contention that seniority is the controlling factor in the assignment of overtime work unless there is a rule in the agreement which specifically provides otherwise.

The Carrier in their denial of the claim points out that the agreement rules cited by the Organization simply do not cover the type of situation which existed in this case; that there is no rule in the agreement to cover the use of signal employees to work on a territory other than their assigned territory; and that Claimant actually worked on his regular assignment during the claim period and therefore sustained no loss of work opportunity. In support of their position, Carrier referred the Board to the opinion expressed in Award 1 of Special Board of Adjustment No. 371 which involved the same parties and rules as cited here.

Rule 15 - WORK OUTSIDE REGULAR HOURS reads as follows:

"(a) Called To Report For Work Outside Regular Hours: Employees released from duty and called to perform work outside of and not continuous with regular working hours will be paid a minimum allowance of two hours and forty minutes at rate and one-half. If held longer than two hours and forty minutes they will be paid at rate and one-half, computed on the actual minute basis.

Time of employees called will begin at time called and will end when released at designated headquarters, unless release is accepted at another point, except that time in excess of one hour from time called to time reporting at designated headquarters or other agreed to point will not be included.

(b) Notified To Work Outside Regular Hours: Employees notified prior to completion of their assignment to report for work outside of regular working hours will be paid a minimum allowance of two hours at rate and one-half. If held longer than two hours they will be paid at rate and one-half, computed on the actual minute basis. Time of employees notified to report for work outside regular hours of assignment will begin one hour prior to time required to report for work and will end when released at designated headquarters, unless release is accepted at another point.

(c) An employee called or notified to report less than two hours prior to regular starting time will be paid at rate and one-half from time required to report for duty until regular starting time, with a minimum of one hour.

(d) When overtime service is required of a part of a group of employees who work together, the senior qualified available employees of the class involved shall have preference to such overtime if they so desire.

Example: Crew 1 has fifteen men in it. Five are engaged, for instance, in tying in line wire. If overtime on such work is necessary, say, of two employees, the senior of the five (group) will be given preference. If entire five men are needed, the five will work the overtime regardless of seniority in the crew of fifteen men as a whole. When there is planned overtime work or service to be performed on rest days, the senior man of the class involved will be given preference to perform such overtime service. This Section (d) and example apply to crew and signal shop."

Rule 16 - SUBJECT TO CALL reads as follows:

"(a) Signal Maintainers recognize the possibility of emergencies in the operation of the railroad, and will notify the person designated by the management of regular point of call. When such employees desire to leave such point of call for a period of time in excess of three (3) hours, they will notify the person designated by the management that they will be absent, about when they will return, and, when possible, where they may be found. Unless registered absent, the regular assignees will be called.

(b) When an employee assigned to a point where two or more shifts are established is absent or when supplementary service is required and there are no qualified relief men available, assignee then on duty will continue on the work until same is completed or until relieved by assignee of a subsequent shift, but in no case will he be worked in excess of sixteen consecutive hours. Regular assignee may relinquish right to additional work referred to herein provided a qualified Signaller is available."

At the outset of our consideration of this case, the Board holds that Carrier's argument relative to the full employment status of the Claimant during the claim period was not raised during the on-property handling of this dispute and therefore will not be considered here. It is too well established to require citation that arguments, issues and contentions by either party to a dispute that were not submitted to the other party during handling on the property cannot be considered by the Board.

From the Board's examination of the language of Rule 15, specifically paragraph (d) thereof, it is determined that this rule has no application to the fact situation which exists in this case. The language of paragraph (d), and the explicit restriction of the agreement provision which makes it applicable only "to crew and signal shop" is clear, unambiguous and subject to no other interpretation. While it is true that paragraph (d) does give senior employees preference to overtime work, such preference has application only in the restricted application which the language of the Rule covers.

Neither do the provisions of Rule 16 apply to the instant situation. There is nothing to be found in the case record to suggest that any of the principals in this case were away from their "point of call" or that they could not be found or that there was any question relative to the availability of qualified relief men. In short, Rule 16 simply does not address a situation such as existed in this claim.

Additionally, Carrier's reliance on the decision reached by Award 1 of Special Board of Adjustment No. 371 is also misplaced. The fact situation which existed in that case clearly indicates that a question of lack of qualifications existed there. Such a situation does not exist in this case. While that Award did recognize that "... in general Carrier has the discretion and right to determine the work requirements of an emergency job . . .," the overall conclusion of the Award is summed up in its final sentence which reads:

"Obviously, it [Rule 16(a)] does not say or imply that such employee must be called to perform work reasonably regarded by Carrier as beyond his present capacities."

No such issue exists in this case.

Carrier's contention that "...where the Carrier is not restricted by the explicit terms of the contract, the Carrier may so act without penalty." is not as widespread or far reaching as Carrier would have the Board believe in this instance. The opinion expressed in Third Division Award 19758 is of particular interest in determining this case. There the Board held:

"Seniority provisions are included in labor relations agreements for the benefit of the senior employees. They seek to protect and give preference in jobs, promotions and other opportunities to employees with greater seniority. In this respect, they are a limitation of the employer's right to operate and manage its business. As such, they must be interpreted in favor of their beneficiaries, and applied wherever the issue arises, unless there are definite limitations of the Rule in the contract. Exceptions to the seniority provisions, if any, should be listed in the agreement. Otherwise the term is widely applied.

* * *

The carrier has not proven either an existing practice to disregard seniority in overtime, where all other elements are equal. Nor has it proven that overtime is excluded from the seniority provisions.

There is no dispute here, either, as to the ability of the employees involved, or their willingness and availability to do the job, or their seniority status, Nor is there any claim of an emergency situation.

Overtime work is a condition of employment and unless specifically excluded, it is to be deemed as part of the benefits of seniority.

Under the circumstances, the claim is justified."

In this case, the emergency situation occurred when the storm struck on October 31. The use of the junior employee began some three days later beginning on November 3. While it is true that an emergency does not end when the last snow flake falls, it is equally true that the passage of three days before the junior employee was used to perform service indicates that considered thought went into the selection of the junior employee over the senior employee. This determination by Carrier raises concern about the use of the affirmative defense of emergency in this instance.

Seniority is one of the basic cornerstones of collective bargaining. Third Division Award 5346 recognized this principle when it held:

"Despite Carrier's contention to the contrary, it is well settled by awards of this Board that even though there are no specific rules in the Agreement covering the situation, seniority is the essence of the Collective Agreement and that it applies in determining preference to overtime work of a given class."

The principle of assignment of overtime on a seniority basis unless restricted by the rules agreement was repeated in Third Division Award 14161 where we read:

"It is our view that unless there is a rule in the agreement or a negotiated local practice providing for the assignment of overtime on some basis other than seniority, that seniority should be the determining factor. This Board has so held on a number of occasions."

Even though that Award denied the claim, it did so on the basis of a Carrier determination "that, under the circumstances, it was decided by those responsible for the work that Crane No. W-3346 was better suited for its performance." Here there is nothing to suggest, much less prove, that the junior employee who was used for the overtime work was "better suited" than the senior employee.

On the basis of the record as it exists in this case, the Board concludes that, absent any other overriding reason for not considering seniority and absent any question of relative ability or other work demands, the senior employee was entitled to the overtime work opportunity here involved. As was said in Award 19758, "Seniority provisions . . . seek to protect and give preference in jobs, promotions and other opportunities to employees with greater seniority." Therefore, on the basis of this particular record the claim in this case is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant 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 27th day of April 1995.