

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33159
Docket No. SG-34248
99-3-97-3-819**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Wheeling & Lake Erie Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling & Lake Erie Railway Company (W&LE):

Claim on behalf of J.J. Stewart, J.A. Gale, R.D. Rouse, T.E. Thompson, P.E. Neal, L.R. Thompson, J.L. Karlosky, E.L. Lamb, and R.P. Southwood for payment of 16 hours each at the time and one-half rate, account Carrier violated the current Signalmen’s Agreement, particularly Rule 19, when it used junior employees instead of the Claimants for an overtime assignment at Rock, Pennsylvania, on April 12, 1996, and deprived the Claimants of the opportunity to perform this work. General Chairman’s File No. 960608A. BRS File Case No. 10423-W&LE(M).”

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 record in this case reveals that on April 11, 1996, a derailment occurred on Carrier's property at Rook, Pennsylvania. To perform the immediate work necessary to clear the derailment, Carrier used not only the Mingo Section Gang which normally performs maintenance work in the vicinity of the derailment, but also the members of a Surfacing Gang along with members of a Production Tie and Extra Gang all of whom were then located in the proximate vicinity of the derailment. After affecting an initial clearing of the derailment and after having been relieved for rest on April 11, 1996, all of these above mentioned forces were subsequently ordered by Carrier to again report for duty on April 12, 1996, their assigned rest day, to finalize the needed repair work after the derailment had been cleared.

The Claimants in this case were assigned to a Production Tie and Extra Gang which at the time was working in the vicinity of Brewster, Ohio, approximately 100 miles from Rook, Pennsylvania. April 12, 1996, was also an assigned rest day for the Claimants.

The penalty claim which was initiated on behalf of the named Claimants alleged a violation of Agreement Rule 19 because of the use of employees who were junior in service to the Claimants to perform the work in question on the assigned rest day - April 12, 1996. Throughout the handling of the dispute on the property, the sole Agreement Rule which was cited and argued by both parties was Rule 19.

"Rule 19 - SENIORITY"

- A. Seniority shall consist of rights based upon relative length of service of employees as hereinafter provided and may be exercised only when vacancies occur, new positions are created or in reduction in force. Seniority shall be confined to the Seniority Districts as described in this Agreement.
- B. Seniority begins at the time an employee's pay starts in the seniority class and district in which employed, except that an employee performing temporary service in a higher class or temporary service in another seniority district will not establish seniority in that class or district.

Two or more employees entering the service in the same class on the same date will be shown on the roster on the basis of the date and time of pre-employment drug screen.

Note: The term ‘temporary service in a higher class’ as herein used means service which is performed on a position which is not bulletined; or service that is performed on a bulletined position pending assignment thereto by bulletin, provided, however, that if an employee performs service on a position that is under bulletin, and is awarded such position, his seniority date in the higher class will date from the date of the commencement of his last continuous service on such position.

- C. Employees promoted from one seniority class to another seniority class will retain and accumulate seniority in all classes in which they have established seniority.**
- D. An employee who is hired or promoted to the following seniority class(es) will establish and accumulate seniority in the corresponding listed classes.**
- F. (sic) Seniority classes will be as follows:**

TRACK

- 1. General Foreman**
- 2. Foreman**
- 3. Track Inspector**
- 4. Assistant Foreman**
- 5. Welder**
- 6. Chief Mechanic**
- 7. Mechanic (equipment)**
- 8. Operator (Class A off track)**
- 9. Operator (Class A on track)**
- 10. Welder Helper**
- 11. Operator (Class B)**

12. Operator (Class C)
13. Track Laborer

BRIDGE & BUILDING

1. General Foreman
2. B&B Foreman
3. B&B Assistant Foreman
4. Bridge Inspector
5. B&B Mechanic/Journeyman
6. B&B Helper"

Before the Board begins its determination of the claim as presented, it is necessary to address an ancillary issue. There is uncontroverted evidence in the case record to indicate that named Claimant R. P. Southwood voluntarily resigned from Carrier's service effective July 11, 1997, which preceded the listing of this dispute with the Board. His resignation notice specifically released the Carrier "from any and all claims or liability out of my employment or resignation from employment with the Company." Therefore, Mr. Southwood is not a proper Claimant in this dispute and his name is dropped.

During the on-property discussion of this dispute, Carrier stated that "a close check of the seniority roster will show that some of the Claimants are really junior to the men that (sic) actually performed the work." However, nowhere in the record are these alluded to employees identified. Additionally, during the on-property handling of the claim, Carrier stated, without contradiction by the Organization, that two of the named Claimants - J. L. Karlosky and Edwin L. Lamb - actually worked and were properly paid for the work they performed on April 12, 1996.

The Organization's primary argument in this dispute centers on the alleged use of "junior" employees to perform overtime work to the exclusion of "senior" employees. It insists that the principles of seniority are paramount in the assignment of overtime work and that, in this instance, the overtime work was planned on April 11, 1996, and the Claimants should have been offered the opportunity to perform such overtime work. It argued, and Carrier did not refute, that no attempt was made to contact the Claimants for this overtime work.

The Carrier, in its Ex-Parte Submission to the Board, candidly stated as follows:

“... it was necessary for the Carrier to utilize the services of numerous maintenance of way employees who were already working in proximity to the derailment. Because of their proximity to the derailment site, the Carrier utilized not only the Mingo section gang, which normally performed the daily maintenance work at that location, it also utilized the members of another of its Production Tie and Extra Gangs (which was manned by the ‘junior’ employees) as well as members of one of its Surfacing Gangs (which was also manned by a ‘junior’ employee) because such gangs were already working in the vicinity. As a result of their proximity to the derailment site, the ‘junior’ employees performed service thereat on April 11, 1996 (date of derailment), and were held over by the Carrier to continue their work at such site on April 12, 1996.”

In addition, Carrier for the first time in their ex-parte Submission cited and relied heavily on the provisions of Rule 14 which reads as follows:

“RULE 14 - SUBJECT TO CALL AND CALLS

- A. Except when employees are notified or called for overtime service, they will be free after their assigned tour of duty.

Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority. (In emergencies consideration will be given to employees that can respond promptly.)

Note: An employee will not be subject to call during vacation period which period shall be considered as beginning with the starting time of his assignment on the first day of his assigned vacation period and end at the starting time of his assignment on the first work day following vacation.”

Carrier’s entire citation of and reliance on Rule 14 comes too late for consideration by the Board. It is too well settled to require citation of authority that Rules and arguments which are not cited and/or joined during the on-property handling of a dispute may not be advanced for the first time before the Board.

This Board has regularly held that seniority is the keystone of a collectively bargained agreement. Third Division Award 5346 said:

“... seniority is the essence of the collective agreement and that it applies in determining preference to overtime work in a given class.”

Preference to overtime is one of the benefits of seniority. In this case, it is acknowledged that “junior” employees were used on April 12, 1996. In this case, there is no question but that there was an exception to the use of the senior employees on April 11, 1996, because of the derailment and immediate need to clear the derailment. However, on April 12, 1996, after the immediate need had abated, the senior employees should have been given the opportunity to perform the overtime work.

Therefore, it is the conclusion of the Board that Claimants Southwood, Karlosky and Lamb are, for reasons explained earlier in this Award, excluded from the settlement of this claim. The remaining six Claimants, if they are, in fact, senior to the “junior” employees who Carrier acknowledges were used on April 12, 1996, are entitled to receive the same number of hours as were worked by the “junior” employees.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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 25th day of March 1999.