

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34007
Docket No. SG-33963
00-3-97-3-490**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

STATEMENT OF CLAIM:

“Claims on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling & Lake Erie Railway Company (WLE):

Claim on behalf of R.M. Crow for payment of 16 hours at the time and one-half rate, account Carrier violated the current Signalman's Agreement, particularly Rule 4, when it did not assign an employee to accompany an operator of a hy-rail vehicle when the vehicle was operated on the track at Rook, Pennsylvania, on April 15 and 16, 1996. General Chairman's File No. 960425A. BRS File Case No. 10325-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.

This claim filed on April 25, 1996, alleges that the Carrier violated Rule 4 when it sent W. E. Renforth to operate the gradall at Rook, Pennsylvania, on the claim dates without being accompanied by another employee. The Organization relies upon Rule 4, TRACK CRANES AND TRACK INSPECTORS, which provides, in pertinent part:

- “A. All on track cranes sent out to work away from gang(s) will have the operator accompanied by another employee such as a helper, laborer, etc.**
- B. All hy-rail vehicles exceeding 1 ton rating and sent out to hy-rail track will have the hy-rail operator accompanied by another employee such as a helper, laborer, etc.”**

The on-property correspondence reveals the dispute between the parties to be whether Rule 4 applies to all hy-rail vehicles when they are on track (as contended by the Organization), or whether the requirement that it must be sent out to “hy-rail track” means that it must do more than be placed on the track on its hy-rail wheels (as alleged by the Carrier).

The Organization contends that the purpose of Rule 4 is safety, and requires that whenever a gradall is used on the rail, the operator must be accompanied by another employee. The Organization notes that Rule 4 does not contain any written exceptions to the additional employee requirement, nor were any intended.

The Carrier admits that the gradall in issue was used in its hy-rail mode and was operated by a hy-rail operator unaccompanied by a helper, but argues that it was not sent out for the purpose of hy-railing track. The Carrier contends that because the gradall was used solely at the Rook, Pennsylvania, yard to load and unload various types of track material, and it did not travel any distance on the track, it is not covered by Rule 4. Before the Board the Carrier argued that it has historically operated the gradall unaccompanied by a helper. The Carrier also contends that the Claimant is an improper Claimant, and that no monetary damages are appropriate because he was fully employed on the claim dates.

Initially we note that the Carrier’s argument about its historical practice was not raised on the property, and cannot be considered by the Board in determining the issue raised herein. A careful review of the record convinces the Board that Rule 4 clearly

applies in this case, as it is admitted that the gradall truck in issue met the over one ton rating and was used in its hy-rail capacity on the claim dates. The Rule itself requires that the vehicle be "sent out to hy-rail track", yet there is no showing on this record that such phrase encompasses a specific job function (track inspection) or a required distance traveled. Rather, when such vehicle uses its hy-rail wheels to operate on the track, it is operating in a hy-rail capacity. The requirement of an additional employee to accompany the operator may well be for safety reasons, which may be minimal if the vehicle is stationary in the yard. However, the Organization has shown that the facts of this case fall within the clear language of Rule 4, and the Carrier failed to show that the circumstances fall within any noted or practical exception to its application.

Accordingly, we find that the Carrier violated Rule 4 by not assigning a helper on the hy-rail vehicle on the claim dates. The fact that the Claimant was not at the top of the seniority roster at the time does not relieve the Carrier from the consequences of its violation. See Third Division Awards 31749, 24210. Despite the fact that the Claimant was fully employed on the claim dates, the Board finds this situation to represent a loss of work opportunity entitling him to a monetary award. Third Division Awards 20633, 20338. However, the Organization has shown no Agreement support for its claim that such payment should be at the overtime rate. Thus, we shall direct the Carrier to reimburse the Claimant for the hours the vehicle was on the track in its hy-rail capacity on the claim dates at his straight time rate of pay.

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 19th day of April, 2000.