

**AN ARBITRATION CONDUCTED PURSUANT TO THE TERMS OF THE APRIL
30, 2013, AGREEMENT BETWEEN THE PARTIES ESTABLISHING
A SPECIAL BOARD OF ADJUSTMENT**

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY	)	
EMPLOYES DIVISION—IBT,	)	
<i>Organization</i>	)	
	)	Headquartered Positions
v.	)	
	)	
DELAWARE AND HUDSON RAILWAY COMPANY, INC.,	)	
D/B/A CANADIAN PACIFIC,	)	
<i>Carrier</i>	)	

INTRODUCTION

A hearing between the parties was held June 28, 2013, at the offices of the Carrier in Minneapolis, Minnesota. At the hearing, the parties agreed that the matter was properly before the Arbitrator for a final and binding decision. Each side had an opportunity to present evidence and its arguments. The parties, who had filed pre-hearing submissions, closed orally, and the record was closed as of the end of the hearing.

APPEARANCES

For the Carrier:

Anthony Stillitano
Labor Relations Officer

For the Organization:

Kevin Evanski
Public Law Board Advocate

Special Board of Adjustment:

Andria S. Knapp, Esq., *Neutral Member*
Randall B. Ohm, Director, Labor Relations (US), *Carrier Member*
Kevin Evanski, *Organization Member*

BACKGROUND

Employees represented by the Organization perform railroad track maintenance work that necessarily takes place out of doors. The meteorological realities of a rail system based in the northeast United States, with its harsh winter climate, mean that only a limited amount of maintenance can be done in the heart of winter. There is a need for some number of permanent maintenance workers, to deal with track maintenance that must be performed all year long regardless of the weather and with emergencies. Historically, however, the Carrier has also formed seasonal “production gangs” using recalls and new hires as necessary to perform large track maintenance projects during the warmer parts of the year. The parties have negotiated terms and conditions under which both permanent and seasonal employees work.¹ This case arose when the Carrier proposed eliminating permanent track welder and work equipment repairman positions throughout the system during the production season in favor of larger production gangs. The Carrier’s intent is to repost the permanent positions at the end of the production gang season.

Permanent, or as the collective bargaining agreement refers to them, regular, employees are based and work in of one of the districts, or geographical territories, into which the Carrier’s system is divided. For the most part,² regular employees work strictly within the geographic boundaries of their district; when a route crosses from one geographic district to the next, responsibility for its track maintenance transfers from (for example) a welder in the first district to a welder based in the second district. Under Rule 4, Seniority, employees’ seniority is tied not only to their classification and craft, but also to their seniority territory—Rule 4.13 defines four geographic seniority territories and a system-wide seniority territory for System Equipment Operators.

¹ See, in particular, Rule 19.

² The primary exceptions are in emergencies and pursuant to Appendix J of the Agreement.

The parties have negotiated special provisions in their Agreement to deal with the seasonal nature of much of the track maintenance that needs to be undertaken annually, most specifically in Rule 19, which permits the Carrier to form seasonal production gangs under certain circumstances. While regular employees work strictly within a single geographic district, the seasonal production gangs established under Rule 19 are mobile. Their work ranges far and wide across the entire system as maintenance needs dictate, without regard to geographic district boundaries. Compared to regular employees, the seasonal gangs work irregular hours and days; they also receive travel expenses.

Every year, the Carrier determines what large-scale track maintenance and renewal projects it is going to undertake during warmer weather, how many positions in each classification the work will require, and what the composition of each interdivisional gang will be. After consulting with the Organization per Rule 19.2, the Carrier bulletins (advertises) for temporary positions on these interdivisional production gangs accordingly; some district employees leave their positions to work on the seasonal gangs. Work on the production gangs lasts as long as the projects last or until bad weather ends the season, whichever comes first. At the end, the gang is disbanded and the employees released. Regular employees who have bid onto a seasonal production gang exercise their seniority to obtain available positions, while other individuals go to furlough status or leave employment altogether. Individual production gangs may be seasonal and the positions temporary, but the Carrier operates gangs regularly, that is, every year during the warmer months. The Carrier has historically filled a number of both welder and work equipment repairman positions on the seasonal production gangs without objection from the Organization.

As a result of the seasonality of track maintenance work, then, in any one job classification the Carrier has both employees whose positions are permanent and geographically limited and

employees whose positions are temporary and geographically unlimited. As the mobile gangs move into each geographic territory, work has to be coordinated and allocated between regular employees and seasonal employees who are in the same position. One of the problems has been coordinating work schedules between the gangs, which work flexible hours and days, and district-based employees, who have regularly defined hours and days off.

The Carrier's goal is to get the work done safely and well, as quickly and as inexpensively as possible. From its perspective, the more flexible employees are, the better, and interdivisional production gang employees fit that bill. While not unconcerned about production values, the Organization is equally concerned with the regularity and stability of its members' employment, as well as protecting their divisional seniority. The Carrier's interest in employees who can work throughout the entire system without regard to geographical district boundaries can conflict with employees' needs or desires for work that is, literally, closer to home, or more geographically limited. Moreover, to the extent that the interdivisional production gangs' work is seasonal and temporary in nature, it conflicts with employees' interests in having permanent positions that are not subject to an annual cycle of bidding, working, and being laid off.

This dispute arose on February 27, 2013, during a meeting between Division Engineer Todd Dragland and Assistant Director Track Programs Brad Delamater for the Carrier and General Chairman Dale Bogart and Vice Chairman John Miller for the Organization. Management informed Bogart and Miller of the Carrier's intent to abolish the existing district positions for welders and work equipment repairmen and advertise new interdivisional welder and work equipment repairman positions for the upcoming production season. At the time, there were ten district welder (or welder-type) positions headquartered two each at five locations (Taylor, PA; Binghamton, NY; Central Bridge, NY; Fort Edward, NY; and Willsboro, NY), and three district work equipment repairman

positions headquartered at Taylor, PA, Saratoga, NY, and Willsboro, NY. The Carrier estimated that the transition would be complete by April 1, 2013. In addition to objecting at the February 27 meeting, the Organization formally notified the Carrier by letter dated March 4, 2013, of its objections to the proposed actions and its belief that abolishing the headquartered positions and establishing them on interdivisional production crews would constitute a unilateral change to the terms and conditions of employment established in the collective bargaining agreement. On March 21, 2013, the Carrier responded, asserting its position that the matter was not a unilateral change in the Agreement, but rather an interpretation of the contract language. The parties met to discuss the issue on April 1 and April 8, 2013, and agreed to an expedited arbitration of the dispute on a non-precedential basis as to the proper forum. The parties entered into an agreement establishing this Special Board of Adjustment on April 30, 2013.

Simultaneous with the parties' discussions, the Carrier implemented its plan. On March 4, 2013, it advertised three interdivisional work equipment repairman positions, with start-up locations in the same three locations where the district WERs were headquartered. On March 15, 2013, the district WER positions were abolished, and the interdivisional positions filled five days later on March 20, 2013. On March 18, 2013, the Carrier advertised seventeen interdivisional welder positions. It abolished the ten district welder positions throughout the system on March 22, 2013, and filled the new interdivisional welder positions on April 1, 2013.

ISSUES PRESENTED

At the arbitration hearing, the parties stipulated to the following statement of the issue for decision by the Board:

—Did the Carrier violate the collective bargaining agreement when it abolished headquartered welder-related positions and work equipment repairman positions and

bulletined and awarded interdivisional seasonal production welder-related and work equipment repairman positions?

—If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The parties' collective bargaining agreement, dated March 15, 2010 (as amended), provides, in relevant part:

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RULE 3

VACANCIES AND NEW POSITIONS

ASSIGNMENT TO POSITION

- 3.1 In the assignment of employees to positions under this Agreement, qualifications being sufficient, seniority shall govern.
- 3.2 The word "seniority" as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.

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ADVERTISEMENT AND AWARD

- 3.6 All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. The advertisement shall show position title, rate of pay, headquarters, tour of duty, rest days and designated meal period.
- 3.7 Advertisements will be posted on Mondays and shall close at 5:00 P.M. ten calendar days following. Advertisement will be posted at the headquarters of the gangs in the sub-department of employees entitled to consideration in filling the positions, during which time an employee may file his application.

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RULE 4

SENIORITY

SENIORITY DATE

- 4.1 Except as provided in Rule 3.19, seniority begins at the time the employee's pay starts. If two (2) or more employees start to work on the same calendar day, their seniority rank on the roster will be in alphabetical order. An employee assigned to a position of higher class than trackman will begin to earn seniority in such higher class and lower class on the same seniority roster in which he has not previously acquired seniority from the date first awarded an advertised position in such higher class. He will retain and accumulate seniority in the lower class from which assigned. An

employee entering service in a class above that of trackman will acquire seniority in that class from the date assigned to an advertised position and will establish seniority as of the same date in all lower classes on the same seniority roster.

An employee displacing a junior employee who was promoted in his absence in accordance with Rule 5.1 shall acquire the same seniority date as the employee displaced and shall rank immediately above such employee.

- 4.2 If two (2) or more employees acquire seniority in a higher class on the same day, their relative rank in the higher class shall be the same as in the class from which promoted. If promoted from different classes, they will be ranked in accordance with their earliest seniority dates.

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SENIORITY TERRITORIES

- 4.13 The seniority territories are identified as follows:

Territory # 1.

Sunbury, Pennsylvania to Terrace Drive, East Binghamton, New York.

Territory #2.

Terrace Drive, East Binghamton to Schenectady interlocking, and South to Voorheesville, including yards at Binghamton, Oneonta and Schenectady.

Territory # 3.

Voorheesville to Albany, up to Mechanicville, West to Glenville, North to Whitehall, including yard at Whitehall. Also Saratoga Springs to North Creek, and Fort Edward to Glens Falls on Lake George Branch.

Territory # 4.

Whitehall to Rouses Point, including branch line from South Jct. to Fredenburg Falls.

(System Equipment Operators)

System

The seniority territories may only be changed by agreement between the designated Carrier officer and the General Chairman.

SENIORITY ROSTERS

- 4.14 A roster, revised as of January 1 and to be posted February 1, showing the employee's seniority date in the appropriate seniority district will be posted within such seniority district at headquarter points where employees are required to report for work. Copies of all rosters will be furnished the General Chairman and the involved local representatives. Copies of seniority rosters will also be available to employees who are working on Inter-Divisional gangs with no fixed headquarters.

RULE 19

PRODUCTION GANG WORK

- 19.1 The Carrier may establish production gangs to handle projects requiring additional manpower over a fixed period of time. These may be tie gangs, surfacing gangs, rail gangs, ballast gangs, curve patching gangs or welding gangs. Additional gangs may be included in this Rule 19 subject to agreement between the General Chairman and the designated Carrier officer.
- 19.2 When the Carrier intends to establish a gang pursuant to Rule 19.1 and such gang is to operate over more than 1 seniority territory, it shall give at least fifteen (15) days' written notice thereof to the General Chairman and, in so doing, provide the following information:
- (i) Type of gang.
 - (ii) Description of territory over which it is programmed to work, by mile post locations (plus or minus) and the estimated work time at each location and the seniority territories involved.
 - (iii) Length of time the gang will operate.
 - (iv) Number of positions in each classification assigned to the gang.
 - (v) Tour of duty and work week.
- 19.3 Within ten (10) days after receipt of the notice provided in Rule 19.2, the General Chairman or his delegate shall confer with the designated Carrier officer to discuss the proposed gang work and the allocation of positions in accordance with employees' seniority.
- 19.4 The Carrier will bulletin all positions in the Inter-Divisional Gang to the System as per Bulletin Rules of the Agreement, including the information in Rule 19.2. Such bulletin will identify how many positions of each classification are available. A working list will be established under this Agreement to be used for assigning the positions bulletin for the Inter-Divisional Gangs only. The positions shall be awarded, to the senior applicants from this working list.
- 19.5 Vacancies required to be filled on a gang will be bulletined and awarded in accordance with Rule 19.4 above.
- 19.6 An employee filling an advertised position in a gang established under this Agreement must remain with the gang to which assigned during the period said gang is in active operation, except that an employee may make application for an equal or higher rated position on another unit established under this Agreement, or he may make application for an equal or higher rated regular position in accordance with the applicable rules of this Agreement. (Equal or higher rate is defined to mean straight time hourly rate of the position).
- 19.7 Rate of Pay: The rates of pay for a position regularly assigned to a gang established under this Agreement will be the rate applicable to such positions under this Agreement.
- 19.8 (a) Employees assigned to a gang established under this Agreement may perform the primary duties of their advertised position and any other work generally recognized as work of

their particular classification throughout the territory without regard to seniority territories.

- (b) When extra help is required to fill unannounced vacancies in the gang while enroute, first opportunity shall be provided to employees on the seniority territory on which the work is being performed.
- 19.9 An employee awarded a position on such gang as a result of the automatic bidder requirements of Rule 3.8 shall be required to work within his seniority territory only, but may subsequently remain with the gang by choice, subject to displacement rights of employees when the gang enters other seniority territories.
- 19.10 In the first quarter of each calendar year, the carrier will meet with the BMWED General Chairman and/or his designees for the purpose of sharing information on the production work planned for the D&H in that calendar year. This discussion will also include a review of how the production work schedule may impact the starting times and basic workweeks of Basic Maintenance forces throughout the D&H.

In addition, D&H will share with the BMWED General Chairman the crews that are contemplated for the calendar year under Side Letter No. 4.

It is understood that the information shared in this discussion is a general overview and may change as the work year progresses.

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APPENDIX "J" (Dated August 23, 1990, as revised by the December 18, 1991 Memorandum of Agreement)

[Address, salutation and closing omitted.]

This has reference to the proposal of the Carrier, made during the recently concluded negotiations, to establish system seniority.

The proposal was discussed at length during which you [the Organization] expressed vigorous concerns with respect to the establishment of a broadly based seniority territory.

At the same time, the Carrier expressed concern about the fact that the existing seniority boundaries restricted the assignment of employees adjacent to the boundary of one seniority territory to assist employees adjacent to the boundary of the adjoining territory during short term projects.

The Carrier agreed to withdraw the proposal on the understanding that short term assignments, for periods of up to five (5) working days, in the above circumstances would not be counter to any provisions of the Agreement.

The provisions of this letter do not affect the right of the Carrier to assign employees across seniority boundaries during emergencies.

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Side Letter No. 4 to 2010 Agreement, dated February 1, 2010:

[Address, salutation and closing omitted.]

The company may establish subdivision and/or cross sub-division Utility crews to perform basic track and/or Bridge and Building projects. These crews will operate under "Production Rules."

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Crews established under this rule will not replace or reduce basic maintenance crews established at fixed headquarters in either the Track or Bridge and Building sub-departments.

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POSITIONS OF THE PARTIES

The Organization.

The Carrier is in violation of both the seniority provisions of the Agreement and Rule 19. It violated Rule 4 when it assigned interdivisional welder and WER gangs to work on multiple seniority districts. Under Rule 4.13, Rule 19, Appendix J, and Side Letter No. 4 of the March 15, 2010, collective bargaining agreement, the Carrier may not assign work across seniority districts unless specifically permitted to do so under the Agreement. Rule 4.13 establishes four geographic seniority districts, each made up of its own Maintenance of Way class and craft rosters. These seniority districts confine and reserve work to employees who have established and maintain seniority within their seniority district. Rule 19, Appendix J and Side Letter No. 4 all provide modifications to the seniority district provision. Their existence establishes that the Carrier was aware of the contractual restrictions on assigning employees across seniority district; there would be no need for the modifications if the Carrier were free to assign employees across seniority districts as it has done in this case.

The Carrier's reliance on Rule 19 as a defense is misplaced. The plain language of Rule 19 provides the Carrier with the ability to establish interdivisional production gangs, but only for projects requiring additional manpower and for a fixed period of time. These restrictions were put

into place so that the Carrier could not effectively undermine district seniority by creating interdivisional production gangs. Rule 19 does not permit the Carrier to eliminate all the district crews. Production gangs are created when additional manpower is needed to do production work, not basic maintenance. Moreover, the Carrier did not follow the proper procedure for notifying the Organization regarding the interdivisional production gangs. In fact, initially it refused to meet with the Organization to discuss the issue.

Rule 19 does not permit the Carrier to make assignments as it did, and neither do Appendix J and Side Letter No. 4. Appendix J allows the Carrier temporarily to assign district gangs from one seniority district to assist crews on an adjacent seniority district under limited circumstances. That is not what the Carrier has done in this case, by eliminating all district crews in favor of interdivisional production crews. Appendix J establishes only that the Carrier is aware of seniority district restrictions and that it has to bargain for any changes to the status quo. The Carrier made a bargaining proposal for system-wide seniority, which the parties did not adopt. By its actions, the Carrier is attempting to gain the benefits of system seniority by replacing district positions with interdivisional gangs. The interdivisional gangs pull from a list of employees from all four seniority districts. By eliminating the headquartered jobs, the Carrier is attempting to implement system seniority.

Nor does Side Letter No. 4 permit the Carrier to act as it did. The Side Letter permits the Carrier to establish interdivisional production gangs, but it expressly states that such gangs will not replace or reduce basic maintenance crews, i.e., the district crew positions. Side Letter No. 4 is similar to Rule 19, and in fact requires the Carrier to comply with Rule 19 in establishing the interdivisional utility gangs. The Carrier's emphasis on "utility gangs" is misplaced—the labeling of a gang is not as important as the function of the gang. In this regard, a utility gang can be any type

of gang. The utility gangs authorized by Side Letter No. 4 perform “basic track and/or Bridge and Building projects.” Here, the Carrier was assigning an interdivisional crew to perform basic track welding and WER duties. Rule 28 lists the classifications, positions and rates; both welder positions and WER positions are listed in the Track sub-department and fall under Side Letter No. 4. The Carrier’s contention that welders are not assigned to utility crews is without substance; welders have been assigned to utility crews in the past.

By way of remedy, the Carrier should be ordered to re-advertise the ten welder positions and three work equipment repairman positions that it improperly replaced with interdivisional gang positions. The thirteen employees whose jobs were improperly replaced must be compensated for the total number of hours worked by the improperly assigned interdivisional welders and WERs.

The Carrier.

Rule 19 expressly gives the Carrier authority to establish welding gangs under production crew rules. Pursuant to that authority, the Carrier properly bulletined seventeen seasonal interdivisional welder and welder-type positions on March 18, 2013, and four interdivisional WER positions on March 11, 2013. There is absolutely no prohibition, express or otherwise, in the collective bargaining agreement that restricts the Carrier from abolishing headquartered positions during production season in an effort to realign its forces. Under Rule 19, welding work is not “reserved” for employees who hold seniority in the district in all contexts. Rule 19.8 (a) and (b) expressly state that welding production gangs can perform all work of that classification regardless of seniority territories and whether or not there are welders in district positions.

The Organization has failed to prove that the Carrier violated any specific negotiated provision of the collective bargaining agreement. The Organization failed to cite any express

provision of the collective bargaining agreement prohibiting the challenged action in either its letter dated March 4 or that dated March 24. When pressed, the Organization claimed that abolishing the headquartered positions was a violation of Side Letter No. 4 regarding “utility crews.” Side Letter No. 4 is inapplicable. On its face, it deals with a discrete type of crew, a utility crew, permitting such a crew to operate on a cross subdivision basis under the more flexible production gang rules. The term “utility crew” was not new or unique to this Side Letter. Such crews have been around for years but have not included welders or WERs. The limiting language in Side Letter No. 4 requires a causal connection between the positions bulletined as part of a utility crew and the potentially affected headquartered positions. The language applies only to headquartered positions directly affected by the creation of equivalent positions on a “utility crew” bulletined as such. The prohibitive language does not apply to *all* headquartered positions. Moreover, all the welder and WER positions in this case were bulletined and awarded as interdivisional production gang positions, not as “utility crews.” Nor are the positions at issue part of utility crews designed to perform basic track maintenance and/or Bridge and Building work. They are performing production work, large-scale projects done as part of an ongoing process of track renewal that continues until completed, typically in the Fall. The work is distinct from the “basic maintenance” referenced in Side Letter No. 4. What Side Letter No. 4 *does* establish is that, where the Organization wanted to restrict the Carrier’s ability to assign work, it knew how to do so.

The Organization’s implied prohibition argument, based upon the existence of seniority territories, is unfounded and beyond the authority of this Board. There is no implied prohibition whereby the Carrier cannot reallocate manpower by abolishing the less efficient headquartered positions. Maintenance of way employees establish and accrue district seniority and compete for headquartered positions within a particular district using that seniority. An employee can establish

seniority in more than one district. Abolishing a headquartered position may have an effect on the job that an employee currently holds, but it has no effect on his district seniority. The employee continues to retain and accrue district seniority and has the right to exercise it to another position.

The fact that employees possess district seniority does not necessarily mean that they have an exclusive right to work within a classification (*e.g.*, welder) in that district. The Carrier also has rights, including the right to bulletin interdivisional positions whose work crosses district boundaries for the production gangs whose track renewal work constitutes a major annual capital project that crosses the Carrier's entire system during the non-winter months. The Organization would have this Board legislate a restriction on the Carrier's ability to reallocate the available work force to source the additional manpower needs of the seasonal production gangs, in lieu of employing new hires to fill the additional manpower needed on the production gangs. The abolishments will be temporary. The Carrier cannot leave positions vacant, for example, if a welder bids to a temporary interdivisional gang. The Carrier has to either back fill or abolish a vacant position. Since the Carrier needed additional manpower on the production crews and did not have authority to backfill by hiring new employees, it was forced to abolish the positions. The Carrier will re-establish district positions after the production season to perform necessary work. The practical effect of a finding for the Organization is that the Carrier would not be able to fill necessary interdivisional gang positions if there were no volunteers. It would be forced to hire new welders for temporary jobs while experienced qualified welders would be relatively inactive and untouchable in their headquartered positions. Such a ruling is beyond the jurisdiction of this Board.

The Carrier has the managerial prerogative to abolish positions without any negotiation with the Organization, and in the past has abolished positions in one seniority district and bulletined the same position in a different seniority district. Here it has abolished headquartered positions and

bulletined interdivisional positions. Numerous arbitration awards recognize that the Organization has the burden of proof and that it must submit probative evidence that the Carrier is restricted by clear express language in the collective bargaining agreement—in this case, that the disputed welder and WER positions must be maintained exclusively at headquarter locations and cannot serve as a source for production crew positions. There has been no such showing. Rule 19, Appendix J and Side Letter No. 4 are not merely modifications of what the Organization sees as reserved seniority district rights. They are significant express understandings that override those “reserved” rights. Rule 19.2 provides the Carrier the ability to establish production gangs to handle projects requiring additional manpower for a fixed period of time. The circumstances in this case met both criteria; the Carrier needed additional manpower diverted to the interdivisional gangs. Taken to its logical extreme, the Organization’s argument would prohibit the Carrier from abolishing district positions in any classification that is being used on the large interdivisional gangs during the lengthy but temporary production season. This would be a major restriction on the Carrier’s ability to manage its workforce that would not have been agreed to without express language and should not be implied simply by use of the term “additional.” To infer such a major restriction based upon the existence of district territories in view of the large express provision for interdivisional production gangs, including welding gangs, would be beyond this Board’s jurisdiction. The Carrier’s actions were authorized and properly undertaken under Rule 19, and the complaint should be dismissed.

FINDINGS AND OPINION

The Special Board of Adjustment, upon the whole record and all the evidence, finds that the carrier 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 Special

Board has jurisdiction over the dispute involved herein pursuant to the parties' Agreement establishing the Board, dated April 30, 2013.

For years, the Carrier has had, in effect, two separate workforces for track maintenance: a permanent workforce that takes care of basic maintenance throughout the year, and a seasonal workforce that tackles large-scale, system-wide track renewal projects beyond the scope of what the permanent workforce can do.³ Because of the climate over its routes, the large-scale projects can only be undertaken in warmer weather, and the Carrier engages in the railroad equivalent of "making hay while the sun shines." This seasonal work is substantial in nature: for the welder and work equipment repairman positions at issue in this grievance, the Carrier usually fills more temporary positions during "the season" than there are permanent positions. Basically, the Carrier has to get an entire year's worth of large-scale track renewal projects done in the six- to seven-month window that it has before harsh winter weather sets in again.

The record establishes that the Carrier has historically maintained a relatively constant number of welder-related and work equipment repairman positions at its district headquarters over the years, to perform basic maintenance work. The record also shows that the Carrier has historically established and filled a number of welder-related and work equipment repairman positions on the interdivisional seasonal production gangs.⁴ Finally, the record also establishes that the conflict between the Carrier and the Organization over seniority territories versus system seniority dates back to the earliest days of the parties' bargaining relationship,⁵ with the Carrier

3 "Beyond the scope" in terms of the size and logistics of the projects, not employees' skills.

4 The evidence in the record dates back to 2004, but the general consensus at the arbitration hearing was that the data was typical of preceding periods as well.

5 See, Appendix J, dated August 23, 1990. The Organization had a prior bargaining relationship with the previous owner, but 1990 is when the relationship between this Carrier and the Organization was established.

attempting at various times over the years, unsuccessfully, to negotiate changes in the existing seniority provisions to make seniority system-wide.

This case represents the first time that the Carrier has eliminated permanent district-based, or headquartered, positions during the production gang season, and the issue before the Board is whether it violated the parties' agreement when it did so. The Carrier must rely on volunteers from its existing workforce to move onto the production crews, and some do—but not enough to fill all of the positions. In lieu of hiring new employees for the interdivisional gangs, the Carrier would like to move experienced employees from the divisions onto the seasonal production crews.

The parties have addressed the need for seasonal track maintenance, and large gangs to accomplish that work, in their agreement, specifically in Rule 19. In interpreting collective bargaining agreements, it is important to look not only at individual provisions but also at the entire agreement, in order to understand the context for those individual provisions. In addition, the parties' conduct over the years gives insight into their mutual interpretation of the language and provisions of their agreement. In this case, the Carrier has retained the right to establish positions and to abolish them when they are no longer needed. It does not have the right unilaterally to assign employees in permanent positions to the seasonal production gangs. Overall, the agreement focuses on permanent, or district-based, employment. For instance, Rules 3.6 and 3.7, relating to the advertisement and award of open positions, refer to headquarters location in position announcements and for posting purposes. Rule 19, then, is an exception to the normal district-based employment addressed in the agreement as a whole. Moreover, the record is that the parties have treated it as such in the past. The language of Rule 19 itself recognizes the parallel existence of regular jobs in the different seniority territories through whose geographic boundaries the interdivisional gangs will work. Rule 19.9 limits employees called back from furlough under Rule

3.8 to gang positions to work “*within [their] seniority territory only.*” (Emphasis added.) Under Rule 19.8(b), when extra help is needed to fill unannounced vacancies on an operating production gang, “employees *on the seniority route on which the work is being performed*” (Emphasis added) will have the “first opportunity” at any openings.

Rule 19.1 permits the Carrier to “establish production gangs to handle projects requiring additional manpower over a fixed period of time,” including expressly welding gangs. The critical language is “projects requiring additional manpower over a fixed period of time.” “Additional” must be in addition to *something*, and that something can only be the basic track maintenance that goes on year-round. Moreover, “fixed period of time” must be read in context. Here, the “fixed period of time” is in contrast to the continuing nature of basic track maintenance. Again, the parties have historically used Rule 19.1 as the basis for establishing the project-based seasonal gangs that perform the large-scale interdivisional track renewal work that cannot take place during inclement winter weather.⁶ This is exemplified in Rule 19.2, which requires the Carrier to notify the Organization when it intends to establish an interdivisional gang of the type of gang; the territory over which the gang will work, including the estimated amount of time at each location and the seniority territories involved; the length of time the gang will operate; number of positions in each classification; and tour of duty and work week.

Under Rule 19.8(a), employees working on a production gang “may perform the primary duties of their advertised position *and any other work generally recognized as work of their particular classification throughout the territory without regard to seniority territories.*” (Emphasis added.) The Carrier used this provision to justify its decision to have interdivisional welder gangs

⁶ There is actually no language in Rule 19 that limits gangs to a particular season, but the warm-weather production gangs are what Rule 19 has been most used for.

and work equipment repairmen perform not only the projects for which their gangs were established but also all basic maintenance work throughout the districts requiring those skills. A certain amount of overlap between the work of interdivisional welders and that of headquartered welders is unavoidable, and presumably Rule 19.8(a) was negotiated to minimize jurisdictional disputes between the different groups of welders. But Rule 19.8(a) does not give the Carrier the blanket authority it claims. If it did, the exception would swallow the rule. Rule 19 authorizes production gangs to perform *additional* work; the Carrier would interpret Rule 19.8(a) to include not just additional work but *all* work. Given the parties' historic interpretation of Rule 19 and its scope, that is clearly not what was intended when they originally negotiated the language. Rule 19 was intended to supplement the basic workforce, not supplant it. Under Rule 19, the Carrier has authority to establish welding gangs under production crew rules. The Carrier's right to establish such crews is not unlimited, however. The critical operative language is "under production crew rules," and production crews are properly established to perform work requiring "additional manpower over a fixed period of time."

The Organization's real complaint here is not that the Carrier established production welding and WER gangs; after all, it has done so annually for years without complaint from the Organization. The real complaint is that *as part of establishing the interdivisional crews* the Carrier simultaneously abolished the headquartered welding and WER positions at issue in this case: it is the causal relationship between the two actions to which the Organization objects. As noted previously, there is no dispute that the Carrier has the right to abolish positions when, in its judgment, they are no longer needed. Here, however, the Carrier has acknowledged that it needs welders and WERs on a permanent basis, so it is not abolishing the positions because the work no longer needs to be done. The Carrier's intention is to re-establish the "permanent," or regular,

positions when the production gangs have disbanded at the end of the season. This would turn each regular position into two seasonal positions, one interdivisional during the production season, alternating with one headquarterd during the rest of the year. In the end, abolishing the headquarterd positions is a means of forcing the employees holding those positions to bid on interdivisional gang positions in order to maintain continuing employment. That is not what Rule 19 was intended to do, nor is it how Rule 19 has been mutually interpreted by the parties in the past. Accordingly, the Board finds that the Carrier violated Rule 19 when it abolished the headquarterd welder and WER positions at issue here solely during the interdivisional production season and with the intent of re-establishing the positions at the end of the production season.

The Carrier's concerns about using its existing resources as efficiently as possible are understandable, and the Board is not saying that the Carrier is required to maintain regular district positions if there is no regular work in the position in perpetuity. Nor is the Board saying that only district welders may perform "basic" welding work within their geographic district; such a ruling would conflict with Rule 19.8(a). But any changes to the existing protocols must be in accordance with the collective bargaining agreement or negotiated with the Organization. For instance, the Carrier referenced problems coordinating schedules between headquarterd positions, which work regular hours and days, when production crews, which have irregular schedules, move into the district to work. The problem is one that must be resolved through bargaining.

As for a remedy, the Carrier must re-establish the thirteen abolished district positions as soon as possible, giving the displaced welders and WERs an opportunity to bid for the positions. The Organization also seeks to have each of the thirteen displaced welders and WERs reimbursed 8 hours for each day since their positions were abolished and their duties performed by a production crew. There is no evidence that they have been harmed to that extent. The displaced employees are

entitled to be reimbursed any losses in compensation, benefits and/or seniority incurred as a result of the Carrier's action, and the Board remands the matter back to the parties for further calculations.

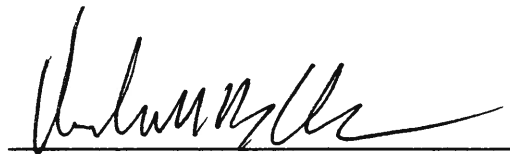
AWARD

Pursuant to the discussion above, the claim is sustained. Individual claimants are entitled to be made whole for any loss in compensation, benefits and/or seniority incurred as a result of the Carrier's abolishing their district positions in the spring of 2013.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants be made. The Board will retain jurisdiction pending implementation of the remedy ordered above, not to exceed a period of six (6) months.


Andria S. Knapp, Neutral Member


Randall Ohm, Carrier Member


Kevin Evanski, Organization Member

DISSENTING

9 September 2013

Date