

BEFORE PUBLIC LAW BOARD NO. 1837

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
NORFOLK & WESTERN RAILWAY COMPANY

Case No. 59

Dispute - Claim of the System Committee that:

1. The Agreement was violated when the Carrier, on October 20 and 21, 1987, assigned Wheeling and Lake Erie Agreement Section Foreman A. Cruz, Assistant Section Foreman, R.M. Shubrowsky, Trackman-Truck Driver J.D. Riedel, and Trackman R. James and R. Saleem to perform track repairs at Atlas Ledeir in Cleveland, Ohio on territory covered by the Nickel Plate Agreement (File MW-BUE-87-28)
2. As a consequence of the aforesaid violation, Nickel Plate Agreement Section Foreman A.T. Johnson, Trackman-Truck Driver D.M. Gates and Trackman W.L. Davis shall each be allowed pay for an equal proportionate share of the total man-hours expended by the Wheeling and Lake Erie Agreement employees performing the work referred to in Part (1) above.

Findings:

Claimant A.T. Johnson has established and holds seniority as a section foreman. Claimant D.M. Gates has established and holds seniority as a section foreman. Claimant W.L. Davis has established and holds seniority as a trackman. On October 20 and 21, 1987, the Carrier assigned five employees who had established and held seniority under the Wheeling and Lake Erie Agreement but held no seniority whatsoever under the Nickel Plate Agreement, to perform track repairs at Atlas Ledeier in Cleveland, Ohio. They expended eighty (80) man-hours performing the track work in question.

The Organization asserts that Claimants were fully qualified and readily available to perform the work in question had the Carrier afforded them an opportunity to do so. The Organization contends that Carrier deprived Claimants of the opportunity to perform work to which they were entitled pursuant to their seniority under the Agreement.

The Carrier contends that the Organization has failed to meet its burden of proof that a violation occurred. In addition, the Carrier argues that the Organization's claim is excessive and constitutes a penalty.

This Board has thoroughly reviewed the record in this case and we find that the Organization has met its burden of proof that the Claimants had established and held the appropriate seniority for the assignments in question and that the carrier wrongfully assigned six employees who had established and held seniority on the former Wabash territory but held no seniority whatsoever under the Nickel Plate Agreement, to operate brush cutters on the Clover Leaf District.

The Agreement clearly states in Rule I that:

"seniority will be restricted to seniority districts as hereinafter provided, on which seniority has been established."

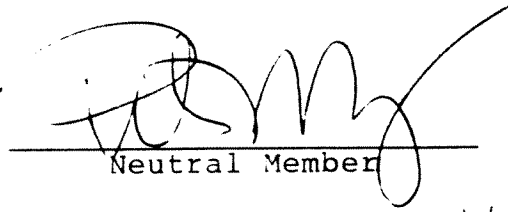
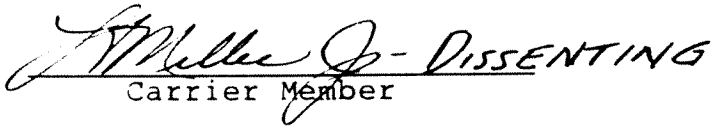
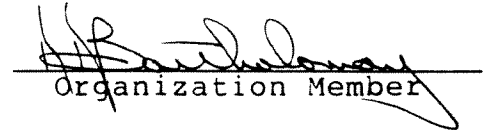
The Record reveals that the Claimants were fully qualified and available to perform the work. Although the Carrier contests their availability, contending that they were working on assignments elsewhere, this Board finds that since those assignments had been made by the carrier the Claimants are still to be considered available. As the Third Division stated in Award 13832:

"The fact is that Claimants were working where Carrier has assigned them, hence were not only available but Carrier was then availing itself of them. If they were not available at the time and place where the extra work was to be done, it was because Carrier chose not to assign them there." (See, also Third Division Awards 19324 and 25964).

With respect to the Carrier's argument that granting the claim would be considered a penalty or somehow excessive, this Board states that in numerous awards the Divisions and various Boards have held that awarding the pay for rule violations of this kind is appropriate since the Claimants were, in essence, denied the work.

Award

Claim sustained.


Neutral Member
Carrier Member
Organization MemberDate: 3-28-90

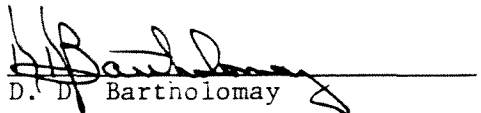
Carrier dissents to the penalty payments awarded. there is no provision in the agreement for penalty payments, and there is no evidence that the fully employed claimants were monetarily damaged.

LABOR MEMBER'S RESPONSE to
CARRIER MEMBER'S DISSENT on
AWARDS 59, 60, 62 and 63 of
PUBLIC LAW BOARD NO. 1837

Apparently, to emphasize its displeasure with several well reasoned Awards of Public Law Board No. 1837, the Carrier Member added comment to each signature page of Awards 59, 60, and 62 and then reiterated its position concerning the merits as further dissent to Award 63. Suffice it so say that those arguments were not persuasive at the initial hearing nor the subsequent executive session. The only "distortion" involved in these claims was Carrier's refusal to follow the Agreement and the numerous prior Awards on this property involving the same violation.

Moreover, there was no penalty payment involved here as Carrier suggests. There is ample precedent for payment for an Agreement violation and in this instance where there are already several Awards on the issue, payment plus interest should have been awarded. Even assuming arguendo that the Claimants suffered no monetary loss, there is also ample precedent for a monetary Award to protect the integrity of the Agreement.

These Awards are logical and are precedential since they follow the long line of precedent already established on this property.


D. D. Bartholomay