

BEFORE PUBLIC LAW BOARD NO. 1837

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

Case No. 60

Dispute - Claim of the System Committee that:

1. The Carrier violated the Agreement when it assigned Wabash Agreement employees R. Odle, S. Thompson, M. Lockhart, L. Johnson, J. Bradburn and J. Barr to operate brush cutters on the Cloverleaf District (which is Nickel Plate Agreement territory) beginning September 28, 1987 (File MW-MUN-87-27)
2. As a consequence of the aforesaid violation, Nickel Plate Agreement Brush Cutter Operations R.A. Hicks, Jr., O.D. Powell, Jr., J.D. Carter, F.E. McFarling, J.L. Crossland and J.W. Hall shall each be allowed pay:

"for all straight time and overtime hours worked by the employees covered under Scope of the Wabash Agreement beginning September 28, 1987, up to the date the Wabash employees were released to return to their territory. We further request that R.A. Hicks, Jr. and J.D. Carter be placed on the Brush Cutter Operator's Seniority roster."

Findings:

Claimants were employed by Carrier and had all established and held seniority in their respective classes. Beginning on September 28, 1987, the Carrier 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 Cloverleaf District.

The Organization asserts that Claimants were fully qualified and readily available to perform the work in question and that Carrier deprived Claimants of the opportunity to perform work to which they were entitled pursuant to their seniority under the Agreement. The claim was denied and has resulted in the dispute being placed before this Board.

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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 five employees who held seniority under the W & LE Agreement, but no seniority under the Nickel Plate Agreement to perform the track work in Cleveland, Ohio.

The agreement clearly states in Rule I that:

"seniority will be restricted to the 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


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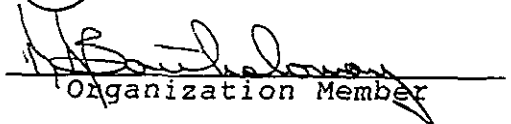
that in numerous awards the Divisions and various Boards have held that awarding the pay for rule violations of this kind is appropriate since the Claimants were, in essence, denied the work.

Award

Claim sustained.


Neutral Member

 - **DISSENTING**
Carrier Member


Organization Member

Date: 3-28-90

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