

BEFORE PUBLIC LAW BOARD NO. 1837

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

Case No. 62

Dispute - Claim of the System Committee that:

1. The Agreement was violated when the Carrier, on May 31, through June 17, 1988, and June 27, through July 14, 1988, assigned employees covered by the Scope of the Wabash Agreement to lay ribbon rail on the Chicago-Michigan City Seniority District which is on the territory covered by the Nickel Plate Agreement (File MW-SG-DECR-88-84).
2. As a consequence of the aforesaid violation, the 51 Nickel Plate Agreement employees listed within the initial claim letter shall be compensated for all straight time and overtime hours expended by the Wabash Agreement employees who performed this work.

Findings:

The 51 Claimants listed in the initial letter of claim have established and hold seniority in their respective Track Department Classifications under the Nickel Plate Agreement.

On May 31 through June 10, 1988, and June 27 through July 14, 1988, the Carrier assigned and used employees covered by the Wabash Agreement to lay ribbon rail on the Chicago-Michigan City Seniority District which is on the territory covered by the Nickel Plate Agreement, dated February 1, 1951. Although the Organization charges that the improper assignment occurred during the week of June 11 through June 17, 1988, as well, this Board finds that the record shows otherwise.

The Organization asserts that the Claimants were 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.

The Carrier contends that since all of the Claimants were fully employed and the work could have been contracted out, the Agreement was not violated when it was performed by the other Carrier employees. Also, the Carrier contends that the Claimants did not exercise their seniority when given the opportunity and furthermore, were fully employed at the time so that there was no monetary loss.

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. The Carrier wrongfully assigned and used employees covered by the Wabash Agreement to lay ribbon rail in the territory covered by the Nickel Plate Agreement.

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 Carrier contests their availability, and states that the Employer had the right to subcontract the work pursuant to Rule 52(c), the Record reveals that the assignments that were being performed by the Claimants had been assigned to them by the Carrier. 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).

The Carrier points out that it was in the interest of the Organization that the work be assigned to other Organization employees rather than have the Carrier sub-contract it. However, the sub-contracting is limited to situations where there is not a sufficient number of employees available or the railroad company does not have proper equipment. First of all, there has been no subcontracting here. Secondly, the Carrier has not shown that they did not have a sufficient number of employees available or that the railroad company did not have the proper equipment. Therefore, that argument of the Carrier must fail.

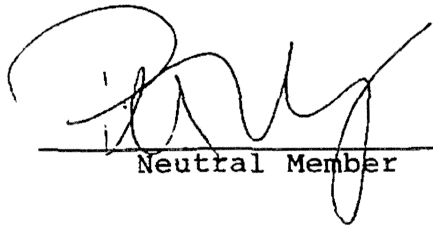
With respect to the Carrier's argument that the Claimants are improper Claimants because they have no rail gang seniority or they did not exercise that seniority when given the opportunity, this Board has reviewed the Record and we hereby find that the Carrier has not met its burden of proof in establishing its case in support of that argument.


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

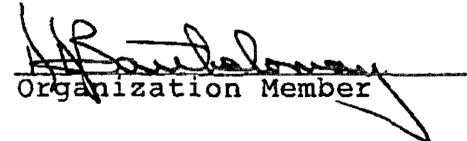
Award

Claim sustained in part. Relief is granted only for the period between May 31 and June 10, 1988, and June 27 through July 14, 1988. Claimant S. W. Harty had been promoted and therefore he is denied

any monetary relief because he was working beyond the scope of the Agreement.


Neutral Member

 - **DISSENTING**
Carrier Member


Organization Member

Date: 3-28-90

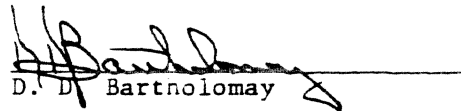
Carrier dissents to penalty payments awarded and to the finding that Carrier failed to meet the burden of proof that Carrier did not have a sufficient number of employees available or that claimants did not have rail gang seniority.

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. Bartolomay