BEFORE PUBLIC LAW BOARD NO. 1837

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

Case No. 63

Dispute - Claim of the System Committee that:

1. The Agreement was violated when the Carrier, on September 8, 1988, used employes who are covered under the terms of the Norfolk and Western Railway Agreement to lay ribbon rail at Ashtabula, Ohio, which is on the territory covered by the Nickel Plate Agreement dated February 1, 1951, (File NW-SG-ROAN-88-187).

2. The twenty-five (25) employes listed in the Attachment to Employes' Exhibit A-1 shall each be paid a proportionate share of all straight time and overtime hours worked by those employes who performed the work from September 5 through September 8, 1988.

Findings:

The Claimants have established and hold seniority in their respective classifications under the February 1, 1951, Nickel Plate Agreement. From September 5 through September 8, 1988, the Carrier used employes coming under the Norfolk and Western Railway Agreement to operate machines such as the rail and tie cranes, trucks as well as extra gang laborers, cook, etc., to perform work normally performed by extra gang employes assigned to install ribbon rail.

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 argues that since all of the Nickel Plate employes were fully employed and the Carrier could have contracted out the

work, the Agreement was not violated when it was performed by the Wabash employes. The Carrier also argues that any payment to the Claimants would constitute a penalty since they were fully employed.

With respect to the procedural issues raised by the Organization, this Board finds that the Carrier has the right to designate the Officer or Officers to whom claims and appeals are to be addressed. Therefore, the Organization's objection to a certain officer handling the claims is found to be without merit.

With respect to the substantive question, 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 an employe who had established and held seniority on the former Wabash territory but held no seniority whatsoever under the Nickel Plate Agreement, to lay ribbon rails at Ashtabula, Ohio.

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, contending that Claimants 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 position that under Rule 52 the Carrier has the right to subcontract the work to outside companies where there is not a sufficient number of employes available, this Board must find that the issue in this case does not involve subcontracting. Hence, Rule 52(C) does not apply. Although the Carrier is granted some flexibility to do subcontracting, Rule 52(c) does not enable the Carrier to violate the provisions set forth in Rule 1 of the Agreement.

Finally, 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

J. J. Miller Jr. - Dissent Attached
Carrier Member

Organization Member

Date: 3-28-90

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PUBLIC LAW BOARD-1837
AWARD 63

CARRIER MEMBER'S DISSENT

As in Awards 59, 60, and 62, in Award 63 this Board incorrectly awarded penalty payments to fully employed claimants despite the fact that there is no agreement provision for such payments. That patently erroneous application of the agreement is compounded by the Board's total distortion of the facts placed before it in Case 63. The Board sustained the claim holding that claimants were "available" for the work despite the fact that they were working on other assignments; the Board's "logic" in that regard is apparently based on its statement that "since those assignments had been made by the Carrier [emphasis in original] the Claimants are still to be considered available." That statement is totally and undisputably wrong. The fact is that both in the handling of the case on the property (Carrier's Exhibit A-6) and in its presentation before the Board (Carrier's submission, pages 21-23), evidence conclusively established that each and every claimant was given an opportunity to go to the claimed positions. (In fact a few claimants worked on the gang the entire claim period.) Nonetheless, the Board found that "Claimants were, in essence, denied the work." Factually however, any claimants who did not work on the rail gang failed to do so because of their own choice. They certainly were not denied the opportunity to work "by the Carrier." As a result, this award granted payment to employees who rejected the opportunity to fill positions for which they later filed claims.

This award is patently erroneous and without precendential value.

Carrier Member

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