

BEFORE PUBLIC LAW BOARD NO. 1837

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

Case No. 61

Dispute - Claim of the System Committee that:

1. The Carrier violated the Agreement when it assigned Wabash Agreement Machine Operators H. Dworsack and G. Durbin to operate machines (weed mower and tamper) on the Cloverleaf District (which is Nickel Plate Agreement territory) from September 14, 1987 through October 2, 1987 (File MW-DEC-87-40)
2. As a consequence of the aforesaid violation, furloughed Nickel Plate Agreement Machine Operator F. Bauerle shall be allowed pay for forty (40) hours at the Mowing Machine Operator's straight time rate and three and one-half (3.5) hours at the Tamper Operator's time and one-half rate.

Findings:

Claimant F.L. Bauerle has established and holds seniority as a tamper operator, mowing machine operator, assistant foreman and track laborer.

On September 14, 15, 16, 17 and 18, 1987, the Carrier assigned an employee who had established and held seniority on the former Wabash territory but held no seniority whatsoever under the Nickel Plate Agreement, to operate a weed mower on the Cloverleaf District between Edwardsville, Illinois and Madison, Illinois. He expended eight (8) man-hours per day performing said work.

On September 21, 22, 23, 24, 25, 28, 29, 30 and October 1 and 2, 1987, the Carrier assigned an employee who had established and held seniority on the former Wabash territory but held absolutely no seniority whatsoever under the Nickel Plate Agreement, to operate a tamper on the Clover Leaf District between Madison, IL, and Coffeen, IL. He expended a total of eighty (80) man-hours at the straight time rate of pay and three and one-half (3 1/2) man-hours at the time and

and one-half overtime rate of pay performing said work.

The Organization asserts that Claimant was fully qualified and readily available to perform the work in question and that Carrier deprived Claimant 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 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. Finally, the Carrier argues that the Claimants were not available to perform the work.

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 operate a weed mower on the Clover Leaf District between Edwardsville, IL and Madison, IL. Moreover, the Organization has proven that the Carrier assigned an employe who had established and held seniority on the Wabash territory but held absolutely no seniority under the Nickel Plate Agreement to operate a tamper on the Clover Leaf District between Madison, IL and Coffeen, IL.

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

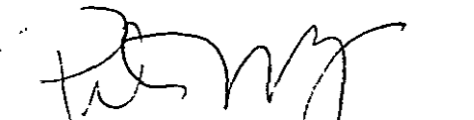
available to perform the work. Although Carrier contests their availability, contending that Claimants were working on assignments elsewhere, this Board finds that since those assignments had been made by the carrier the Claimants are still to be considered available. As the Third Division stated in 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).

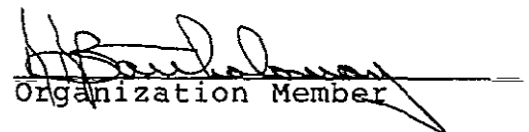
The Record reveals that the Claimant in this case has signed a waiver and release of all claims in connection with another dispute and therefore he will be awarded no back pay.

Award

Claim sustained in part. The Claimant will receive no back pay.


Neutral Member


Carrier Member


Organization Member

Date: 3-28-90