

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39646
Docket No. MW-37889
09-3-NRAB-00003-030299
(03-3-299)**

The Third Division consisted of the regular members and in addition Referee Susan R. Brown when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Machine Operator M. Cottingham to perform foreman duties (obtain and relay track permits, report defects to section forces and Roadmaster) with a rail detector and chase vehicle on the St. Joe Subdivision between Lincoln, Nebraska and Tecumseh, Nebraska on March 25, 26, April 23 and 24, 2002 instead of Foreman M. Lott [System File C-02-J010-25/10-02-0325(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Lott shall now be compensated for thirty-two (32) hours' pay at the foreman's straight time rate of pay.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On the dates in question, a Machine Operator was assigned to pilot a rail detector and chase vehicle between Lincoln and Tecumseh, Nebraska, obtaining and relaying track permits and reporting defects to section forces and the Roadmaster. The Claimant, a Foreman, was performing work as a Truck Driver in Tecumseh during this period. The Organization asserts that this was a violation of several Rules that address scope, seniority, and the assigned duties of each classification.

The Carrier asserts that piloting is not restricted to a Foreman and may be and has been performed by qualified individuals for equipment movements as necessary. Moreover, there is no evidence that the Machine Operator was acting as a supervisor, i.e., directing the work of others. This is an intra-craft dispute and, according to the Carrier, the Board unanimously ruled that in these circumstances, the Organization must prove not only that the work at issue has customarily been performed by the classification in question, but has been performed exclusively, system-wide, by that classification. This must be proved, the Carrier maintains, not merely by reference to the Classification Rules, but by establishing a system-wide practice.

Many Awards of the Board and of Public Law Boards between these two parties have addressed this issue and both parties cited a line of them to support their respective positions. A review of the cited Awards leads us to conclude the following: the current state of the case law acknowledges that there are certain tasks that are exclusive to one classification and there are other tasks that are performed by more than one classification. Prior Awards have established that Rule 55 is a classification Rule, not a jurisdiction Rule. See for example Public Law Board No. 3460, Awards 56, 65 and 67; Public Law Board No. 4104, Award 13; and Third Division Award 33938. Some Awards hold that if the classification description is clear and unambiguous, it

can determine to whom the work belongs. See Public Law Board No. 2206, Award 55: "Where the language of Rule 55 is clear and unambiguous we have not hesitated to enforce its work reservation impact. [Citation omitted] But ambiguous or open-ended language such as that at issue herein cannot be used to sustain this claim." The majority of Awards indicate that for the Organization to claim that particular work is reserved for a particular classification, it must show not only that the work is by custom, practice and tradition performed by the classification claiming the work in the location of the claim, but that the work is performed exclusively by that classification system-wide. See Public Law Board No. 2206, Award 55: "[T]o prevail under a theory of reservation through practice the Organization is required by principles, not of our own making but imposed by the great weight of precedent in this industry, to show such exclusive performance on a system-wide basis." It is universally accepted that the Organization bears the burden of proof to establish its claim.

In this case, the Rule 55 descriptions of the two classifications in question are extremely general: the Machine Operator description refers to operating machines, the Foreman description refers to supervising other employees and reporting to management. Neither clearly includes or excludes the work at issue, requiring the Board to turn to the parties' practice.

The Organization, however, relied completely on the Rule 55 definitions and provided not a scintilla of evidence that this work is performed exclusively by Foremen. It did not respond to the Carrier's assertion, made on the property, that employees other than Foremen had been doing this work for several years. In light of the well-established tenet that the party wishing to establish a practice must produce evidence of that practice, we must conclude that the Organization has not met its burden of proof.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of April 2009.