

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40675
Docket No. MW-40138
10-3-NRAB-00003-070362
(07-3-362)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 abolished the foreman position (held by J. Williamson) on Brush Cutting Crew TMGX0336 and thereafter assigned a Group 3 Machine Operator on said crew to perform the foreman duties beginning February 11, 2002 and continuing until the crew was abolished on March 15, 2002 [System File C-02-P018-26/10-02-0244(MW) BNR].**
- (2) As a consequence of the violations referred to in Part (1) above, Claimant J. Williamson shall now ‘. . . be paid the difference in pay for all straight time and overtime between that of a Foreman - 25 men and the positions he subsequently held between February 11, 2002 and March 15, 2002.’”**

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 April 9, 2002, the Organization filed a claim alleging that "Rules 1, 2, 5, 29 and 55, but not limited thereto, were violated beginning on February 11, 2002 and continuing through and including March 15, 2002 when the Claimant[s] position was abolished and the gang continued to work." In addition to seeking monetary relief for the Claimant, the Organization requests ". . . that all current and future crews that are not bulletined with a Foreman on that crew have a Foreman position bulletined with that crew."

On April 22, 2002, the Carrier denied the claim:

"Our investigation reveals that on the Board Award #35744 did not require Foreman on this machine. The job is bulletin as qualifications BOR and that all Gr. 3 machine operators be qualified under the rules to allow them to get track and time and to function as the employee in charge. There is nothing in the rules that you quote states these are exclusive for Foreman."

On May 22, 2002, the Organization filed an appeal reiterating its arguments as set forth in the claim. It noted that the Claimant was assigned as a Foreman on Brush Cutting Crew TMGX0336, Position No. 42085. The position was abolished, yet the crew continued to work without the supervision of a Foreman. Rather, one of the Group 3 Operators performed Foreman duties as well as operated the equipment. After issuance of Third Division Award 35744, the Claimant's position was abolished to coincide with the report date of the second Machine Operator.

On July 16, 2002, the Carrier denied the appeal and observed that the Organization does not allege a violation of the procedure for abolishing the Foreman position. The Carrier states that a Machine Operator works independently and the Carrier determines when supervision is required; there is no contractual requirement that all employees must be directly supervised at all times. The Carrier determines when to assign duties and abolish positions, because it retains the right to establish the composition of the workforce. Because this is an intra-craft dispute between a Foreman and a Machine Operator, the Organization must prove exclusive performance of this work system-wide.

The Organization issued a confirmation-of-conference letter on February 2, 2007, wherein it stated that the Carrier's right to abolish positions is not unfettered, but must be undertaken in accordance with the Rules. Rule 78 provides for an exception to Rules 2, 5 and 55 only when the work is incidental and does not alter the manning of work forces within existing seniority, scope and classification Rules. Also, "the Organization is not saying that a Foreman is required to operate the Brushcutter itself but a Foreman is required in the safe supervision of the employees . . . operating that equipment. It is enough responsibility for the machine operator to operate this equipment without having to worry about other details such as providing protection for the operators and the equipment, arranging for maintenance and fueling of the equipment, filling out required reports, filling out timerolls, keeping supervisors informed of the progress of the work, and other duties associated with the work of a Foreman." According to the Organization, the Carrier abolished the Foreman position to retaliate against the Organization after the Carrier was required by Award 35744 to add a second Machine Operator.

The Carrier acknowledges that a Foreman is occasionally assigned to work with a brushcutter as a means to coordinate between the crew and other crews or third parties in the area and to ensure efficient operations and avoid interference between the brushcutter's and others' work. Regardless of the Foreman's presence or arrangement, the decision when to assign a Foreman is a management decision and not a contractual requirement. Furthermore, national regulations issued by the FRA contemplate that equipment may be operated without assignment of a supervisor. Finally the Organization does not refute the Carrier's argument that

the Agreement does not contain any restrictions as to when the Carrier may abolish positions.

The issue in Award 35744 was “whether the operation of the brush cutter was properly assigned to a Foreman” and “[t]he record indicates that the Foreman’s duties in operating the brushcutter were not de minimus or incidental to supervisory duties otherwise being performed.”

Award 35744 requires the Carrier to have two Machine Operators manning the Brushcutter and, given the issue as framed, Award 35744 did not focus on whether there is a requirement to have a Foreman assigned to oversee a Brushcutter crew. The phrase in Award 35744 - “supervisory duties otherwise being performed” - implies that there are duties performed by a Foreman, but the extent or depth of those duties was not explained or detailed in Award 35744 because that was not the issue.

According to the Carrier, any duties of a Foreman’s nature performed by a Machine Operator on a Brushcutter are incidental to the Machine Operator’s duties. Furthermore, such duties are not reserved exclusively to a Foreman under any Rule cited by the Organization. The Organization counters that when the Carrier abolished the Foreman position and assigned those duties to the Machine Operator, that left the machine operators performing the duties of a Foreman for a “substantial amount of the workday; work such as obtaining track warrants, track and time permits, entering daily time for payroll and filing machine reports and hourly reports.”

The parties present a factual determination for the Board, that is, whether duties that may fall under the Foreman umbrella and which are performed by the Machine Operator are incidental (BNSF) or consume a substantial amount of the workday (BMWE). As the moving party, the Organization bears the burden of proof to establish the facts to sustain its claim.

A Grade 3 Machine Operator is qualified in the Book of Rules and, therefore, can obtain track-and-time approval without the need or requirement of a Foreman. Award 35744 requires the cab to be manned with two Machine Operators; this is

safety and efficiency. The bulletin stated that “machine operators are required to check oil and fluid levels daily and perform routine maintenance such as changing oil, filters, grease, make small repairs, adjustments, etc. as required or instructed” and “machine operators are required to report weekly to the roadway equipment information center, name, machine location, machine number, hour meter reading, and machine problems.” (See Engineering Instructions 14.3.5.)

These duties (maintenance, track-and-time, reporting) are endemic to operating the machine, obtaining safety on the track, and documenting the day’s work. Such duties may overlap with Foreman duties, but are not reserved exclusively to a Foreman under the Agreement or past practice.

Although each party decides what and how to present its case to the Board, there is the notable absence or omission of a statement(s) from the Group 3 Machine Operators on the brushcutter. They have the first-hand experience and knowledge of the duties they were performing so as to enable the Board to determine whether their workday is substantially consumed with Foreman duties. The Board will not assume or speculate about that first-hand experience and knowledge presented herein as an assertion. Where an assertion of a dispositive fact or element in the claim is not substantiated, the assertion remains unfulfilled. In view of the assertion, the Organization has not established that a substantial portion of the work associated with the abolished Foreman position was performed by a Machine Operator.

Even with a Foreman assigned to this type of crew in the past, the Rules relied upon by the Organization do not mandate or require the Carrier to maintain that set-up forever because this matter implicates management’s oversight staffing. As stated in Third Division Award 11441, “[w]e have consistently held that, unless otherwise specifically provided in the Agreement, [the] Carrier has the sole and exclusive right to determine when and under what circumstances a foreman is assigned to supervise a group of employees.” In the circumstances presented in this claim the Carrier determined that the direct onsite presence of a Foreman was not necessary or required by the Agreement.

Given these findings, the Organization’s claim is denied.

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AWARD

Claim denied.

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 1st day of November 2010.