

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35744
Docket No. MW-35340
01-3-99-3-203**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe 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 failed and refused to bulletin an additional Group 3 Operator position on a brushcutter identified in Bulletin No. EL-06 of March 25, 1996 in accordance with Rule 20 of the Agreement. (System File C-96-B050-19/MWA 96-08-21AB BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. K. Crofford shall be ‘ . . . paid all straight time and overtime worked by the employees assigned to this Brushcutter at the Group 3 rate of pay from April 30 [1996] and continuing.’”

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 March 16, 1996, the Carrier issued a bulletin for a temporary Group 3 Machine Operator and a temporary Foreman to operate an on-track brushcutter in the area of Ashland, Nebraska. This type of brushcutter has controls on one side of the machine that operate the movement of the machine. These controls make the machine go forward or backward and regulate the speed of the machine. There are also controls on both sides of the machine that activate the cutting heads, and there are dead man pedals on both sides of the machine to raise and lower the cutting heads. When the machine is operating, both cutting heads must be lowered so the machine will remain properly balanced, and both dead man pedals must be depressed. There is no dispute that this requires two employees to be in the cab of the machine while it is in operation.

The June 11, 1996 claim in this case alleges that the Carrier should have bulletined and assigned a second Group 3 Machine Operator to operate one side of the brushcutter instead of assigning the work to a Foreman. The Organization contends that the Carrier may not permit a Foreman to perform work reserved to employees who are specifically classified under Rule 55N as Machine Operators and who are expressly designated as the employees who operate the brushcutter machine in question. On the contrary, the Organization points out that Rule 55 B provides that a Foreman is "an employe assigned to direct the work of men and report to officials of the railroad." Thus, in the Organization's view, there is a clear contractual line of demarcation between the work recognized as specifically reserved to Machine Operators and the supervisory work reserved to Foremen. The Organization argues that the Carrier crossed that line when it bulletined and assigned a Foreman to perform the brushcutter work in dispute.

The Carrier, on the other hand, contends that staffing levels and work assignments are within the inherent rights and prerogatives of management. Such rights were properly exercised in this case when the brushcutter machine was staffed with a Foreman and a Machine Operator. The Carrier maintains that the manufacturer recommends that two employees be in the cab of the machine during operation. The assignment of a Foreman and a Group 3 Machine Operator meets that requirement. Accordingly, absent any explicit Rule in the Agreement that requires three employees to work this single piece of equipment, the claim should be denied.

During the handling of this claim on the property, a dispute arose as to whether the Carrier indicated during a claims conference that there was a past practice of assigning the work in question. The Carrier correspondence dated November 5, 1998 states that on a portion of Seniority District 13 in Eastern North Dakota and Northern Minnesota, brush cutters are bulletined for and operated by one Foreman and one Group 3 Machine Operator. Thus, the Carrier concluded that there was no merit to the Organization's contention that the brushcutter required a second Group 3 Machine Operator.

The Organization refuted that assertion with bulletins issued by the Carrier from District 13 addressing the assignment of brush cutters. The bulletins indicate that in 1995 the brushcutter was assigned to two Group 3 Machine Operators. In 1996 and 1997, the Carrier did not have brush cutters in that District and instead utilized on-track weed mowers that were also staffed with two Group 3 Machine Operators.

Additionally, the Carrier contended that Foremen are working members of the crews they supervise. They are permitted to assist with the work at hand and to perform incidental duties directly related to the task being performed. To the extent that the Foreman in the instant case raised and lowered the cutting head and maintained foot pressure on the dead man pedal, the Carrier submits that the Foreman was simply assisting in some of the ancillary or incidental duties involved in the operation of the brushcutter. Thus, although the Organization alleged that a second Machine Operator was needed to perform these incidental tasks, it is clear to the Carrier that the allegations are not supported by the Agreement.

The Board carefully reviewed the record. At issue here is whether the operation of the brushcutter was properly assigned to a Foreman. The Carrier's interest in the efficient allocation of work and its inherent prerogative to bulletin and assign job duties is recognized, but it is not unfettered. It must be balanced against the equally legitimate interests of the employees to perform work that is ascribed to them under the provisions of the Agreement. The question whether the disputed brushcutter assignment is within the exclusive domain of the Group 3 Machine Operators therefore must be determined by considering whether the Carrier's actions amounted to an abuse of its discretion based on all relevant factors.

Under the facts as they have been presented during the handling of this case on the property, the Board concludes that the Carrier's actions amounted to an abuse of

discretion. Even if the Board were to consider the Carrier's newly advanced argument that the Foreman performed only incidental duties as part of his job as a working Foreman, it is clear that such argument would be unpersuasive. The record indicates that the Foreman's duties in operating the brushcutter were not de minimus or incidental to supervisory duties otherwise being performed. On the contrary, it is undisputed that two employees were needed to operate this equipment. The Foreman was one of those employees. The fact that the Machine Operator operated two sets of controls does not diminish the equally important fact that the Foreman had to operate the brushcutter controls and pedals on the other side of the machinery which activate, raise and control the cutting heads. In so doing, the Foreman was acting as one of the operators of the machinery and not as a supervisor. It necessarily follows that a Group 3 Machine Operator was denied the right to perform the brushcutter assignment.

The Board notes, too, that notwithstanding the Carrier's arguments, the evidence suggests that prior assignments have been made utilizing two Group 3 Machine Operators and not, as asserted by the Carrier, a Group 3 Machine Operator and a Foreman.

These factors compel the conclusion that the claim has merit. On the subject of remedy, the Carrier argues that the Claimant was fully employed and therefore suffered no loss. We examined the cases cited and recognize the divergent views often expressed on this particular subject, but it appears that the precedent Awards involving the particular parties in this case hold that the Claimant lost his rightful opportunity to perform the work and is entitled to a monetary claim. See Public Law Board No. 4768, Award 1; Public Law Board No. 2206, Award 52; Third Division Award 20892.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of October, 2001.