

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40210
Docket No. MW-38573
09-3-NRAB-00003-040485
(04-3-485)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to bulletin the machine operator positions for operating Brush Cutter BBCT-164S on the Palestine Division beginning June 12, 2003 and continuing and instead assigned junior employees W. Foehr and J. Simmons (System File MW-03-304/1374429 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid machine operator positions shall now be properly bulletined and assigned and Machine Operators K. Burley and D. Potter shall be compensated at their applicable rates of pay for all straight time and overtime hours worked by junior employees W. Foehr and J. Simmons in operating said brush cutter on the Palestine Division beginning June 12, 2003 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.

Claimants K. Burley and D. Potter established and hold seniority as Machine Operators within the Track Subdepartment on the Palestine Division. On the relevant dates, they were regularly assigned to positions working 7:00 A.M. to 3:30 P.M., Monday through Friday, with Saturday and Sunday as rest days. Messrs. W. Foehr and J. Simmons established seniority as Machine Operators and are junior to Claimants.

The Organization alleged that the Carrier violated various Rules when Machine Operators Foehr and Simmons allegedly operated a brush cutter within a 23 mile portion of the Palestine Division beginning on June 12, 2004 and over the course of numerous dates. Conversely, Track Supervisor Williford and Manager of Track Projects McMeekin indicated that the brush cutter was used for less than ten days, far less than the 20 days required.

The Organization claims that the Carrier violated the Agreement when it did not bulletin the two Brush Cutter positions in question. According to the Organization, e-mails from the relevant junior employees show that they utilized the brush cutter on more than 20 days for at least eight hours per day. Because the brush cutter was so used, the positions should have been bulletined and the Claimants, who are senior to the assigned employees, should have been assigned to the work. As a remedy, the Organization asks that the Claimants be compensated for all hours that were worked by the junior employees utilizing the brush cutter.

Conversely, the Carrier contends that the burden is on the Organization to prove that the Carrier acted inappropriately. According to the Carrier, it is clear that the junior employees used the brush cutter for less than ten days and, therefore,

there was no need to bulletin the position. According to the Carrier, there is an irreconcilable dispute of fact in this case and the Board is therefore unable to resolve the matter. Thus, the claim must be dismissed.

In the instant case, the Board finds that the Organization has been unable to meet its burden to prove that the Carrier should have bulletined the Brush Cutter positions. It is clear that the facts provided by the junior employees' statements and those provided by the statements of Williford and McMeekin are opposing and thus, there is an irreconcilable dispute of fact. The Board cannot resolve such a matter. When such a dispute occurs, the Board has no choice but to dismiss the claim. See Third Division Awards 35855, 35497 and 33951.

AWARD

Claim dismissed.

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 21st day of December 2009.