

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40890
Docket No. MW-40137
11-3-NRAB-00003-070359
(07-3-359)**

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:

The Agreement was violated when the Carrier abolished the foreman position on TMGX0335 Brush Cutting Crew and thereafter assigned a Group 3/4 Machine Operator on said crew to perform the foreman duties, beginning February 27, 2002 and continuing [System File C-02-P018-31/10-02-0308(MW) BNR].

As a consequence of the violation referred to in Part (1) above, Claimant R. Jensen shall now ‘. . . be paid at the Foreman Rate of pay all hours, straight time and overtime worked by the Machine Operators on this machine from the claim date until this violation is corrected by adding a Foreman to direct the work of the men on this machine. This is a continuing claim for as long as this violation continues.’”

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 10, 2002, the Organization filed a claim alleging that "Rules 1, 2, 5, but not limited thereto, were violated beginning on February 27, 2002 [and continuing when] the Carrier assigned a Group 3/4 Machine Operator from machine X110039 a (BRUSHCUTTER) to do the work of a Foreman." Until the violation is cured, the Organization seeks to have the Carrier "[add] a Foreman to direct the work of men on this machine[.]"

On June 7, 2002, the Carrier denied the claim:

"Our investigation reveals that on the Board Award #35744 did not require a Foreman on this machine. Bulletins for this type position require BOR qualifications and that all Gr. 3 machine operators be qualified under the rules to allow them to get track and time. There is nothing in the rules quoted states where this is exclusive to Foreman."

On June 21, 2002, the Organization filed an appeal:

"... on November 1, 2002, the Carrier bulletined a Foreman position, Job # 42057 and a Group 3 Operator position Job # 44623 to TMGX0335 a Brush Cutting Crew. On November 15, 2002 these positions were awarded to a Foreman and a Group 3 Operator.

On February 16, 2002 a position for a Group 3 Operator, Job # 44625, was bulletined to TMGX0335 Brushcutter. This was done due to a Third Division Award 35744 which mandated that there be

two (2) Group 3 Operators on brush cutting machines. It stated on the bulletin that this was to replace Position 42057 which was originally bulletined as the Foreman position on this crew.

Subsequently the Carrier abolished the Foreman position and then assigned the duties to one of the Group 3 Operators and the crew continued to work.

When the Carrier first bulletined this crew the Carrier recognized the need for a Foreman to supervise the work of the Crew and did bulletin the Foreman position. Nothing has changed, there are still men on this crew that require supervision and that are performing the work of a Foreman.

Again, the crew continued to work without the supervision of a Foreman and one of the Group 3 Operators pulled double duty then taking over the daily duties of the Foreman as well as having responsibility of running the Brushcutter."

On August 15, 2002, the Carrier denied the appeal and noted this matter is not a continuing claim because it has a beginning date (February 27, 2002) and an end date (April 29, 2002). Machine Operators work independently. The Carrier determines when supervision is required; there is no contractual requirement that all employees must be directly supervised at all times. The Carrier's practice is to bulletin Group 3 positions without a Foreman.

Furthermore, the Carrier notes that Third Division Award 35744 mandates two Group 3 Machine Operators for this brush cutting machine. Thus, only Group 3 Operators are needed to operate this machine and a Foreman is not required. Any functions that a Foreman performed as to machine work can be performed by an Operator under Article XI of the 1991 National Imposed Agreement, incorporated as Rule 78 in the parties' Agreement. Because this claim presents an intra-craft dispute between a Machine Operator and a Foreman, the Organization must show it exclusively performs the work system-wide to sustain its claim.

The Organization issued a confirmation-of-conference letter on January 20, 2005, wherein it provided the Carrier with 14 statements from employees which asserted that Group 3 Operator positions may have been bulletined without a Foreman but “they never worked foul of or on the track without a Foreman being present[.]” Many of the 82 Group 3 positions relied on by the Carrier are off-track positions (LSD Weedmower); they do not foul a track and are in a gang that has a Foreman already assigned so the presence of a Foreman would not be noted in the bulletin.

A machine on a gang may be bulletined after the incumbent Operator bids off and, given that, the bulletin does not identify working with a Foreman although one is assigned to direct the work of the gang. The Foreman position may be bulletined along with the Group 3 position or, as the equipment moves from one location to another, it would flow with the Foreman assigned to a particular area.

In a subsequent confirmation-of-conference letter (February 2, 2007), 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.” The Carrier cannot abolish the Foreman’s position without adhering to the Rules.

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 the requirement to have a Foreman assigned to oversee a brushcutter manned by two Operators. The phrase in Award 35744 - “supervisory duties otherwise being performed” - implies that there are duties performed by a Foreman when assigned to oversee a brushcutter crew, 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 relied upon 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 "pulling double duty" because they were 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 Organization also argued, in 2007, that having a Foreman present enhances or ensures the safety of Machine Operators while on track.

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 (Carrier) or consume a substantial amount of the workday (BMW). 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 on the Book of Rules and, therefore, can obtain track-and-time approval without the need or requirement of a Foreman. The Organization's Submission acknowledges that the protection or safety of Machine Operators is met with two Operators in the cab of the equipment. 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." Also, "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 have overlapped with Foreman duties but are not reserved exclusively to the Foreman.

For other work alleged by the Organization to be Foreman duties and performed by a Machine Operator “pulling double duty,” the record is unclear and the 14 statements from employees present a mixed practice. In this regard, some employees’ statements deal with equipment other than a brushcutter while other employees acknowledge operating a brushcutter without a Foreman present and, yet, others acknowledge that they or their co-operator obtained track-and-time authority without assistance or approval of a Foreman.

Aside from these 14 statements, there is the absence or omission of a statement(s) from the Group 3 Machine Operators on this brushcutter. They have the first-hand experience and knowledge of the duties they were performing in “pulling double duty.” 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 sufficiently substantiated, the assertion remains an assertion. In short, the Organization failed to establish that a substantial portion of the work associated with the abolished position (Foreman) was performed by another employee (Machine Operator).

Whether direct, onsite presence of a Foreman is required is not established based on this record. 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 supervisory determinations. “We 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.” See Third Division Award 11441.

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 10th day of March 2011.