

PUBLIC LAW BOARD NO. 7738

Case No. 1
Carrier File No.: 10-09-0255
Organization File No.: C-09-J010-29
Claimant: G. W. Garbo

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BNSF RAILWAY COMPANY))
(former Burlington Northern Railroad Company)))
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-and-))
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BROTHERHOOD OF MAINTENANCE))
OF WAY EMPLOYEES DIVISION - IBT RAIL))
CONFERENCE))
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STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned Track Foreman C. Woodside to perform Group 3 Machine Operator work (operate a brushcutter) on Brush Cutting Gang TMOX2759 on the Chicago Division, Brookfield Subdivision between Paloma, Illinois and Palmyra, Missouri beginning on January 12, 2009 and continuing through March 6, 2009, instead of bulleting and assigning a machine operator thereto (System File C-09-J010-29/10-09-0255 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Garbo shall now '.... Be paid all hours at Group 3 Machine Operator rate of pay as settlement of this claim.' (Employees' Exhibit A-1)."

FINDING

The Board finds that the parties herein, Carrier and Employee are within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of the parties and the subject matter.

The Claimant, G. W. Garbo is a Group 3 Machine Operator. On January 12, 2009, the Carrier assigned Foreman, C. V. Woodside of Brush-Cutting Gang, to perform the work of a Group 3 Machine Operator in place of the Claimant. As a result of this assignment, the Foreman worked from January 12, 2009 to March 6, 2009, operating a brushcutter. The Organization submitted a claim on behalf of the Claimant and alleged a violation of the Collective Bargaining Agreement.

The Organization maintains that the Carrier has historically "...bulletined and assigned (2) Group 3 Machine Operators to operate the brush cutting machine." However, on the days in question, the Carrier assigned a Foreman to operate the brush machine, instead of assigning another Group 3 Machine Operator. The Organization insists the failure to assign another Group 3 Machine Operator was a violation of Rule 5 G, Seniority Roster; Rules 55, Classification of Work; and Rule 20, Position To Be Bulletined. In support of its position, the Organization cites NRAB Third Division Award 35744 which finds for the Organization, based on almost identical facts.

As a Remedy, the Organization claims that the Claimant "lost a tangible loss of work opportunity that damages the employee who deserved to perform the work." Thus, the Claimant should be fully compensated for the loss of the opportunity to perform the work (See Organization's Submission).

The Carrier contends that the issue is an intra-craft dispute, thus the Organization must establish that "the disputed work has been exclusively performed by the claimants on a system-wide basis." The Carrier states that the Organization failed to meet its burden to establish exclusivity or any past practices to support its claim. The Carrier cites Rule 78, Intra-Craft Work Jurisdiction to support its position that it was permissible under the Agreement to assign the work to a Foreman. The Carrier insists that there is no Rule within the Agreement which reserves any work to employees and the Rules cited by the Organization do not support their reservation arguments. Specifically, the Carrier states that Rules 1,2,5, and 55 do not reserve "the disputed work to Claimant." The Carrier cites several past arbitral precedents to support its position. (See Organization's Submission).

After careful review of the record, the Board finds that the evidence presented by the parties establish that the Carrier violated the Agreement by assigning Foreman, C. V. Woodside to perform work of a Group 3 Machine Operator, instead of the Claimant on the dates in question. Both parties submitted a wealth of documents and detailed analysis on several Rules in the Agreement. The evidence within the record supports the conclusion that the assignment of the Foreman to perform machine operator work violated Rules 20 and 55. It is primarily these two Rules 20 and 55, which are dispositive of the issues before this Board. Rules 20 and 55 states, in part:

RULE 20

All vacancies and new positions of more than thirty (30) calendar days' duration shall be bulletined in the seniority district for the sub-departments involved.

RULE 55

All vacancies and new positions of more than thirty (30) calendar days' duration shall be bulletined in the seniority district for the sub-departments involved.

The application of these Rules was analyzed in NRAB Third Division Award 35744 where the fact pattern is almost identical to the instant case. In that case, "the Board determined that the Carrier's assignment of a foreman, instead of a machine operator to operate a brushcutter was a violation of the Agreement." (See, Organization's Submission). Similar to the facts in this grievance, the Organization claimed "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 Carrier argued "that staffing level and work assignments are within the inherent rights and prerogatives of management." Without doubt the Carrier has the right to make assignments and determine staffing needs but there are limits. Those limitations have been negotiated by the parties and incorporated into a collective bargaining agreement. In this case, Rules 20 and 55 are among the provisions of the agreement which not only provides guidance on filling positions but also places some limitations on the Carrier's authority to fill vacancies and make assignments.

With regards to Rule 20, the Board finds that the evidence clearly shows that the Carrier failed to follow the procedures for filling the Group 3 Machine Operator position on January 12, 2009. The record indicates that two Group 3 Machine Operators were needed to operate a brushcutter machine which normally requires two individuals to operate. Instead, the Carrier only bulletined and assigned one Group 3 Machine Operator and assigned a Foreman as the second employee to operator the machine. The record also indicate that this assignment was going to last for more than 30-days. Indeed, it lasted almost 60 days. The language in Rule 20 is plain and unambiguous. It mandates that "all vacancies and new positions of more than thirty (30) calendar days' duration shall be bulletined." There is little left to interpret when the parties have agreed on such language as "all" and "shall." Therefore, in this grievance, the Board finds that based on the plain language in Rule 20, the Carrier was required to bulletin and assign more than one Group 3 Machine Operator.

In addition to the requirement to bulletin the position, Rule 55 clearly defines the various classifications of work. Specifically, Rule 55 N defines the work of a machine operator and Rule 55 B defines the work of a foremen. These duties are distinct and different.

The work to be performed was for a machine operator. Moreover, the work performed was work normally performed by a machine operator, not a Track Foreman.

The Board concludes that the Carrier violated Rule 20 and 55 of the Agreement, when it assigned a Track Foreman to perform Group 3 Machine Operator work on January 12, 2009 and continuing through March 6, 2009.

The Board findings are based on the clear language of Rules 20 and 55. The Carrier has argued that the Organization has failed to establish exclusivity under Rule 78. Rule 78 states:

RULE 78. INTRA-CRAFT WORK JURISDICTION

Employees will be allowed to perform incidental task which are directly related to the service being performed and which they are capable of performing, provided the task are within the jurisdiction of the BMWV. Compensation shall be at the applicable rate for the employee performing the service and shall not constitute a basis for any time claims by other employees. This provision is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, and scope and classification rules.

It is clear from Rule 78 that within the various crafts they may complete a task of each other so long as it is "incidental". The key term in Rule 78 is "incidental". The plain meaning of the term relates to a function that is minor, not major but is *de minimis* in nature. Here, the record reflects that the Foreman performed the entire functions of a Group 3 Machine Operator for an extended time. Clearly, this not incidental to the work of a Foreman. There is no doubt that the Rule 78 permits the Carrier to make assignments among the crafts, however, there are limitations.

The Board agrees with the Carrier that had this purely been a claim of exclusivity, the Organization would have had a heavy burden to carry as outlined in several of National Railway Adjustment Board NRAB) Third Division Awards, as set forth in the Carrier's Submission. However, the Board has determined that this case can also be resolved based on the restrictive language within Rule 78 which places limitation on assignments within craft positions, and Rule 55. As stated in National Railway Adjustment Board NRAB) Third Division Award, 40106:

Contrary to the position set forth by Carrier, because the disputed work is covered by 55, and is not "incidental" to the work of the

Machine Operators, the Organization need not show the exclusive past performance by its members.

The Board concludes that whether it bases its findings on Rule, 20, 55 or 78, the evidence in the records clearly supports the conclusion that the Carrier is prohibited from unilaterally resigning work from one class of employees as designated under rule 55, to another class of employees, unless there is a permissible exception to the above Rule.


With respect to damages, as requested in Part (2) of the claim, the Board recognizes there are different views with respect to awarding straight time and/or over time to a claimant, if they actually worked during the time in question. The Organization does not dispute that the Claimant worked on the dates in question. This Board takes the view that the Claimant "lost his rightful opportunity to perform the work and is entitled to a monetary claim." The Carrier should not escape their responsibility to make the Claimant totally whole. This includes compensating the Claimant for the right to work in his classification as required by the Agreement. Based on these principles, this Board follows the view cited in several NRAB Awards which have reached similar conclusions. See, NRAB Third Award 35477.

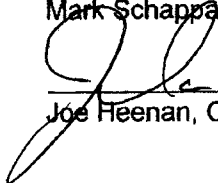
AWARD:

Part (1) and (2) of the Claim of the Organization is Granted.

June 5, 2017


Floyd D. Weatherspoon, Neutral Member

 6-5-17
Mark Schappaugh, Organization Member

 6-6-17
Joe Heenan, Carrier Member - Dissenting
opinion to
follow