

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 10/Award No. 10
Carrier File No. 10-10-0559
Organization File No. C-10-J010-12-65
Claimants: M. Dirks and M. Flores

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)
)
-and-)
)
BNSF RAILWAY COMPANY)

Statement of Claim:

1. The Agreement was violated when the Carrier failed to assign Messrs. M. Dirks and M. Flores to perform welding duties on July 30, 2010, at Ardmore, South Dakota (System File C-10-J010-65/10-10-0559 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimants M. Dirks and M. Flores shall now each be compensated for eight (8) hours straight time at their appropriate rate of pay.

Facts:

Claimants M. Dirks and M. Flores are classified Welders who have established and hold seniority within the Welding Sub-department. On July 30, 2010, the Carrier directed two Roadway Equipment Sub-department Group 2 Machine Operators (Messrs. Witt and Brott) to weld on a frog at Ardmore, South Dakota. On July 30, 2010, Messrs. Dirks and Flores worked their regular eight-hour shifts and an unspecified amount of overtime.

Organization Position:

The Organization contends there is no dispute that the two Roadway Equipment Sub-department employees welded a frog on the day in question and that the two Group 2 Machine Operators performed no Roadway Equipment Sub-department work at the subject location on July 30, 2010. Rule 55K describes the work assigned to classified Welders as follows.

. . . The operation of any welding device used in the performance of such work as repairing, tempering and cutting rails, frogs and switches, welding and cutting in connection with construction, maintenance and dismantling of bridges, buildings and other structures, and any other welding and cutting in Maintenance of Way Structures Department

In light of what it maintains is the clear language of Rule 55K, the Organization asserts that a Rule 55K violation transpired. As a remedy, it submits that in order for Messrs. Dirks and Flores to be made whole for the loss of work opportunity and to protect the integrity of the Agreement, each Claimant should be compensated for eight hours of straight time pay at the appropriate rate of pay.

Carrier Position:

The Carrier urges that no Agreement violation occurred at the Ardmore, South Dakota work site on July 30, 2010; because the Organization has failed to prove that, without exception, the disputed work is performed exclusively by bargaining unit employees in the Welder classification.

The Analytical Paradigm

This controversy and the nine companion Matters currently before Public Law Board 7738 for decision are the most recent episode in a long-running line of intra-craft work assignment disputes between the Parties involving the interface between Rule 55 and Rule 78. Those myriad prior adjudications (Public Law Board Awards, National Railroad Adjustment Board Awards and Presidential Emergency Board 219 and Presidential Emergency Board 229) have not produced a consensus objective standard defining the range of BSNF's discretion in the intra-craft work assignments sphere. As is true in any contract interpretation dispute, the touchstone for analysis here must be an effort to ascertain objectively the Parties' mutual intent in negotiating the disputed language of the Collective Bargaining Agreement.

Rule 55 defines the 19 classifications listed therein by delineating the work/tasks performed by employees in each classification. It effectively directs the Carrier as to the manner in which it is to assign bargaining unit work to those 19 classifications. Thus, Rule 55 is accurately characterized as a work assignment clause intended by the Parties to demarcate the lines of work between the 19 Sub-sections A-U classifications. Consequently, it must serve as the Board's initial guide to the manner in which the Parties contemplated that intra-craft work assignment disputes like the ones before this Public Law Board for decision are to be resolved.

Sub-sections A-U of Rule 55 describe and define the work associated with the 19 classifications listed therein with varying levels of clarity and specificity.¹ To a substantial degree, the continuing controversy regarding intra-craft work assignment issues is the result of the latent ambiguity of some of the less precisely worded Sub-sections of Rule 55. Resolution of those latent ambiguities and reconciliation of Rule 55 with the terms of Rule 78 are the central focuses of this analysis.

On its face, Rule 78 establishes a caveat to the general work assignment scheme set out in Rule 55 that confirms the Carrier's discretion to assign incidental tasks that cross-craft lines when those incidental tasks directly relate to the primary work being performed by a bargaining unit employee that is within the employee's craft. The caveat becomes operative when the employee is capable of performing the subject task(s) and the incidental task(s) are within the jurisdiction of the BMWWE bargaining unit.

After carefully considering the contentions of the Parties in light of the voluminous hearing record made by them, the Board has fashioned the following two-dimensional analytical paradigm it will apply in resolving the ten intra-craft claims currently at issue. The bifurcated decision framework set out below contemplates the above-noted latent ambiguity of several of the Rule 55 Sub-sections and turns upon the respective clarity of those Sub-sections.²

The Level 1 Analysis

The intra-craft dispute analysis starts with a determination as to whether the wording of the Rule 55 Sub-section relied upon by the claimant employee(s) is sufficiently clear to indicate the Parties' mutual intent that the work/tasks at issue is to be assigned to those employees.³ If it does, and Rule 55 does not also assign the subject work to another classification(s), a *prima facie* Rule 55 violation is made out. If Rule 55 assigns more than one classification to perform disputed work, the Organizations *prima facie* case fails and the claimant employee's petition for relief will be denied.

¹ By listing the bargaining unit job titles and the various tasks performed by the employees assigned to those classifications Sub-sections A-U of Rule 55 set out some of the information typically contained in a job description.

² This two-tiered framework for analysis in intra-craft work assignment disputes is consistent with the order and allocation of proof paradigm employed in Third Division Awards 7958 and 28236.

³ If the Organization does not prove that the Rule 55 Sub-section relied upon by the claimant employee(s) is sufficiently clear to indicate the Parties' mutual intent that the work/tasks at issue is to be assigned to those employees, the analysis will shift to Level 2 described below.

If the Organization makes out a *prima facie* Rule 55 violation, the burden of moving forward with the evidence shifts to the Carrier to rebut the Organization's *prima facie* case. To do so, the Carrier must prove either (i) that the Rule 78 intermittent work exception is operative in the subject circumstance; or (ii) that an emergency or other exigency warranted the decision to assign the work out of classification. If the Carrier proves that invocation of either of those exceptions to the Rule 55 work assignment structure is warranted, the *prima facie* proof of a Rule 55 violation is rebutted and the claim will be denied. If the Carrier does not rebut via one of those two routes, the Organization's *prima facie* case, a Rule 55 violation is made out and the subject claim will be sustained.

The Level 2 Analysis

This second element of the template for deciding intra-craft work assignment disputes comes to the fore if, because of the latently ambiguous wording of the work/tasks description set out in the relevant Rule 55 Sub-section, the Organization is unable to establish a *prima facie* Rule 55 violation. In that event, the Organization must prove that the Claimant employee(s) performed the disputed work system-wide to the exclusion of all others. If the Organization adequately establishes that, outside of circumstances where the Rule 78 incidental work assignment or the emergencies/exigencies exceptions have been appropriately invoked, only employees in Claimant's classification are assigned to perform the subject work tasks, a Rule 55 violation is made out. If the Organization does not adduce that proof, a finding of no Rule 55 violation will result.

In circumstances where the Board, through application of the above-described decision paradigm finds a violation of the Collective Bargaining Agreement, it will address the question of appropriate remedy.

Application of the Analytical Paradigm to the Relevant Facts of This Case

Rule 55K states unequivocally that Welding Sub-department classified Welders are "assigned to the operation of any welding device used in the performance of such work as repairing, *tempering and cutting . . . frogs . . .*" (emphasis added). Thus, it is clear that the Parties mutually intended that the work at issue here - welding a frog - would be assigned to the Claimants' Welder classification; thereby establishing *prima facie* proof of a Rule 55K violation.

The finding of a *prima facie* violation of Rule 55K shifts the burden of moving forward with the evidence to the Carrier, in this Case to establish that the Rule 78 intermittent work exception was operative in the circumstance that prevailed on July 30, 2010.⁴ The Carrier

⁴ There is no claim by the Carrier that an emergency existed in Ardmore, South Dakota on the day in question. Consequently, the second element of a potential rebuttal of the Organization's *prima facie* proof of a Rule 55K violation is not operative in this Case

has adduced no evidence in that regard. Instead, it relies solely on the assertion that proof of a Rule 55K violation in this Case requires the Organization to demonstrate that without exception, system-wide, only classified Welders weld frogs.

Because the Carrier has not rebutted the Organization's *prima facie* proof of a Rule 55K violation, that proof must stand; and the Claim advanced by Messrs. Dirks and Flores will be sustained.

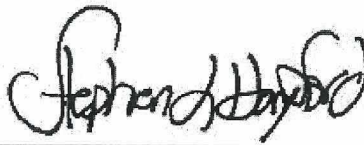
Award:

The instant claim is sustained.

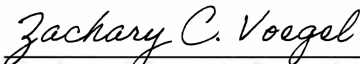
Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award sustaining Messrs. Dirks and Flores claim be made consistent with the findings above.

The evidence in the hearing record shows that on July 30, 2010, Messrs. Dirks and Flores worked full eight-hour shifts and some amount of overtime. Therefore, the Carrier's violation of Rule 55K did not result in the denial of a work opportunity to either Claimant. Therefore, based on the facts of this Case and in the absence of unusual circumstances or proof of a pattern of ongoing, flagrant violations of Rule 55K by the Carrier, Messrs. Dirks and Flores are not entitled to compensation.⁵ Instead, going forward the Carrier is directed to comply with Rule 55 K.

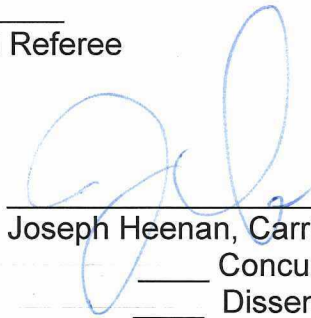


Stephen L. Hayford, Neutral Referee



Zachary Voegel, Organization Member

____ Concurring
____ Dissenting



Joseph Heenan, Carrier Member

____ Concurring
____ Dissenting

Bloomington, Indiana
February 17, 2020

⁵ See Third Division Award 29330, Third Division Award 29202 and Third Division Award 28311.