PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 11/Award No. 11
Carrier File No. 10-11-0221
Organization File No. J010-15
Claimant: R. Webster

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 Mr. R. Webster to perform Roadway Equipment Sub-department work (operating a grader to plow snow) in the Donkey Creek Yards and on the Orion Line on December 30 and 31, 2010, and January 1, 2011 (System File C-11-J010-15/1—11-0221 BNR).

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Webster shall now be compensated for eight (8) hours straight time and thirty-one (31) hours overtime at his appropriate rate of pay.

Facts:

Claimant R. Webster has established and holds seniority as a Group 2 Machine Operator, in the Roadway Equipment Sub-department. Mr. D. Turner has established seniority as a Grinder Operator in the Welding Sub-department and on the dates at issue here was regularly assigned as such. On December 30 and 31, 2010, and January 1, 2011, the Carrier directed Welding Sub-department employee Turner to operate a grader to plow snow in the Donkey Creek Yards and on the Orion Line for a total of eight hours straight time and 31 hours of overtime.

Organization Position:

The Organization insists that the operation of a grader to plow snow is work reserved to Roadway Equipment Sub-department employees by the clear and unambiguous language of the Agreement. Rule 55N states that a Machine Operator is "[a]n employee qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5." In addition, the Organization contends that the work of plowing snow has customarily and historically been assigned to classified Machine Operators in accordance with Rule 55N of the Agreement. In light of the language of Rule 55N, the Organization contends that the Carrier violated the Agreement when it assigned a Welding Sub-department employee in the Grinder Operator classification, who performed no Welding Sub-department work, to operate a grader to plow snow on December 30 and 31, 2010, and January 1, 2011, thereby entitling the Claimant to compensation.

Carrier Position:

The Carrier asserts that Rule 55 does not reserve snow removal work to Machine Operators and urges that in the past that work has been assigned to employees in various other classifications. Therefore, it urges that in order to prevail here the Organization must establish that without exception, system-wide, the disputed work is performed exclusively by bargaining unit employees in the Machine Operator classification; proof the Carrier avers the Organization has failed to adduce. In the final dimension of its argument, the Carrier submits that the snow event of December 30 and 31, 2010, and January 1, 2011, constituted an emergency that enabled management to assign its forces in a manner deemed most appropriate. For all of these reasons, it takes the position that no violation of the Agreement occurred.

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 employes 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 employe that is within the employe's craft. The caveat becomes operative when the employe is capable of performing the subject task(s) and the incidental task(s) are within the jurisdiction of the BMWE 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 employe(s) is sufficiently clear to indicate the Parties' mutual intent that the work/tasks at issue is to be assigned to those employes.[3] If it does, and Rule 55 does not also assign the subject work to another

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[1] By listing the bargaining unit job titles and the various tasks performed by the employes 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 employe(s) is sufficiently clear to indicate the Parties' mutual intent that the work/tasks at issue is to be assigned to those employes, the analysis will shift to Level 2 described below.

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 employe's petition for relief will be denied.

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 Organizations *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 employe(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 employes 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 55 N makes no mention of snow removal work. It is latently ambiguous in that regard. Consequently, in order to make out an Agreement violation in this Case the Organization must prove that outside of circumstances where the Rule 78 incidental work assignment or the emergencies/exigencies exceptions have been appropriately invoked, only employees in in the Machine Operator classification are assigned to perform snow removal. The Union has failed to prove that critical fact and therefore, the instant Claim can only be denied.[4]

[4] Although it is not outcome determinative here, the Carrier's plausible assertion that the snow event of December 30-31, 2010, and January 1, 2011, constituted an emergency

Award:

The Claim is denied.

Order:

This Board, after consideration of the dispute identified above, orders that the instant Claim be dismissed.

Stephen L. Hayford, Neutral Referee

Zachary C. Voegel

Zachary Voegel, Organization Member
____ Concurring
____ Dissenting

Joseph Heenan, Carrier Member
____ Concurring
____ Dissenting

Bloomington, Indiana
February 17, 2020

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enabling it to assign work in an appropriate manner, unrebutted by the Organization, provides further indication that the instant Claim is without merit.