

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 12/Award No. 12
Carrier File No. 10-10-0234
Organization File No. C-10-010-16
Claimant: M. Robison

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

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1. The Agreement was violated when the Carrier failed to call and assign Mr. M. Robison to perform Sectionman duties at Mile Post 178.455 on the Sand Hills Subdivision of the Powder River Division on January 22, 2011 (System file C-11-J010-16/10-11-0234 BNR)..
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Robison shall now be compensated for four and one-half hours overtime at his appropriate rate of pay.

Facts:

Claimant M. Robison has established and holds seniority within the Track Sub - department. On January 22, 2011, the Carrier directed Welding Sub-department employees to perform Track Sub-department work replacing a failed insulated joint at Mile Post 178.455 on the Sand Hills Subdivision of the Powder River Division.

Organization Position:

The Organization believes that the relevant language of Rule 55 is clear and unambiguous. First, it notes that Rule 55Q provides that Sectionmen in the Track Sub-department are to be "assigned to constructing, repairing and maintaining roadway and track and other work incident thereto." Rule 55K provides that Welders in the Welding Sub-department are to be:

assigned to 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 [the] Maintenance of Way Structures Department.

Rule 55L states that Welding Sub- department Grinder Operators are to be “assigned to the operation of a grinding device, performing all grinder operations, either preparatory refinishing, and including the use of the cutting torch.”

The Organization asserts that the work of replacing insulated track joints is track maintenance and repair work customarily performed by Track Sub-department Sectionmen. It rejects as unproven the Carrier’s contention that a management official called Claimant Robison on January 22, 2011, and offered him the subject overtime work, but Robison failed to answer the telephone or return the call. The Organization also insists that the work at issue was not performed by the Welding Sub-department employees on an incidental basis as contemplated by Rule 78.

For all of the above reasons, the Organization avers that the Carrier violated Rule 55Q and it asks that the instant Claim be sustained. As a remedy, it urges that Mr. Robison be made whole in order to compensate him for the loss of work opportunity and to protect the integrity of the Agreement.

Carrier Position:

The Carrier points out that that nothing in Rule 55K, Rule 55L or Rule 55Q clearly reserves the work of repairing failed or broken insulated joints to either the Welder classification, the Grinder Operator classification, or the Sectionmen classification. Thus, it maintains that for the present Claim to be sustained, the Organization must prove that the subject work is performed system-wide by Sectionmen, to the exclusion of all other classifications. The Carrier, pointing to the evidence it adduced, unrefuted by the Organization, showing that the work of repairing/replacing a failed or broken insulated joint has been performed by bargaining unit employees in other Sub-departments, urges that the instant Claim should be dismissed.

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 BNSF’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

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.

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.

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 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 55Q does not specifically address the task of replacing insulated joints. Instead, it confirms that Sectionmen are to be assigned to tasks involving "constructing, repairing

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.

and maintaining roadway and track” and work incidental thereto. Although the replacement of insulated joints is work of the nature contemplated by the broad phrasing of Rule 55Q, the Rule’s wording is not sufficiently clear to establish *prima facie* proof that the Parties mutually intended that only classified Sectionmen are to be assigned the task of replacing insulated joints.

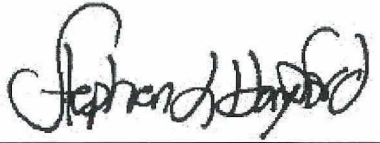
It is clear that classified Sectionmen routinely and customarily replace insulated joints. However, the evidence does not support a finding that outside of circumstances where the Rule 78 incidental work assignment or the emergencies/exigencies exceptions have been appropriately invoked, only employees in in the Sectionmen are assigned to perform that task. Instead, it appears that employees in other classifications are also routinely assigned to replace insulated joints. Given that fact, the instant Claim can only be denied.

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 Voegel
Organization Member



Joseph Heenan
Carrier Member

Bloomington, Indiana
February 17, 2020