

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 20/Award No. 20
Carrier File No. 10-10-00694
Organization File No. C-10-J010-31
Claimant: D. Harvey, et. al

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

Statement of Claim

1. The Agreement was violated when the Carrier failed to assign Messrs. D. Harvey, A. Hixson and M. Kirby to perform section gang duties at various locations between Mile Posts 240.8 and 121, between Cheyenne, Wyoming and Wendover, Wyoming on July 30, 31, and August 1, 2012 (System file C-12-J010-31/10-12-0694 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimants D. Harvey, A. Hixson and M. Kirby shall now each be compensated twenty-four (24) hours straight time and eleven (11) hours overtime at their appropriate rates of pay.

Facts

Claimants D. Harvey, A. Hixson and M. Kirby have established and hold seniority as Section Foreman, Truck Driver and Sectionman within the Track Sub-department. On July 30, 31 and August 1, 2012, the Carrier directed Welding Sub-department employees to assist a work train and unload ribbon rail at various locations between Mileposts 240.8 and 121 between Cheyenne, Wyoming and Wendover, Wyoming.

Organization Position:

The Organization contends that the relevant language of Rule 55 is clear and demarcates the work properly assigned to Foremen, Truck Drivers, Sectionmen, Welders and

Grinders. Thus, Rule 55B provides that a Foreman is an employee assigned to direct the work of men. Rule 55P states that a Truck Driver will perform such other work as may be assigned to him when not engaged in driving a truck. Rule 55Q establishes that the work of Sectionmen in the Track Sub-department is that of constructing, repairing and maintaining roadway and track, and other work incidental thereto. Rule 55K provides that Welders in the Welding Sub-department shall perform various types of welding, cutting, tempering, etc. Finally, Rule 55L states that Grinders in the Welding Sub-department shall perform all grinder operations. In light of the wording of these five Rule 55 Sub-sections, and because it avers that the Welders performed no welding work on the three days in question, the Organization urges that the disputed work should instead have been assigned to Track Sub-department employees. Because it was not, the Organization submits the instant Claim should be upheld and the Claimants be made whole for the loss of work opportunity and to protect the integrity of the Agreement.

Carrier Position:

The Carrier's position turns on two assertions. First, it contends that Rules 55B, K, L, P and Q do not state that the work of unloading ribbon rail is reserved to any of the five classifications addressed by those Rule 55 Sub-sections. Because Rule 55 does not reserve the disputed work to employees in the Foreman, Truck Driver or Sectionmen classification, the Carrier reasons that Claim at issue here can be upheld only if the Organization proved that, system-wide, unloading ribbon rail is performed exclusively by employees in those three classifications. It insists the Organization has failed to adduce that proof. The Carrier maintains further that the Organization failed to refute its assertion that the Welders were required for the subject work because of the need to cut the ribbon rail while unloading it.

For all the above reasons, the Carrier urges that the instant Claim should be denied.

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 BMW E 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

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

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

Neither Rule 55B, Rule 55K, Rule 55L, Rule 55P, nor Rule 55Q refer to the work of unloading ribbon rail. Therefore, Rule 55 does not explicitly reserve the disputed work to employees in the Foreman, Truck Driver or Sectionmen classifications. The instant Claim can be sustained only if the Organization has proven that the Claimants' classifications (Section Foreman, Truck Driver and Sectionman) routinely and customarily perform the disputed work system-wide to the exclusion of others; and that outside of circumstances where the Rule 78 incidental work assignment or the emergencies/exigencies exceptions

work/tasks at issue is to be assigned to those employees, the analysis will shift to Level 2 described below.

have been appropriately invoked, only employees in Claimants' three classifications are assigned to perform the subject work tasks.⁴

The Organization has failed to present that proof. Consequently, the instant Claim can only be denied.

⁴ This Case is complicated by the Organization's contention that employees in three classifications have a claim to the disputed work. However, resolution of this dispute does not require the Board to address that aspect of the Organization's Claim.

Award:

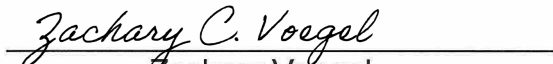
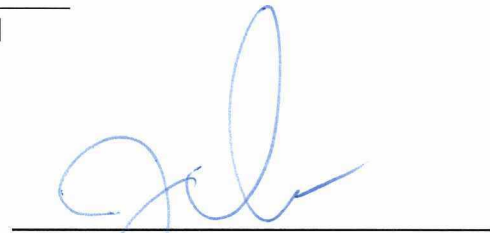
The Claim is denied.

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