

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 23/Award No. 23
Carrier File No. 10-10-00707
Organization File No. C-10-J010-32
Claimant: R. Arcaro

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. Arcaro to perform Machine Operator duties at the Illinois Highway 108 grade crossing at Mile Post 56.90 near Atwater, Illinois on August 7, 2012 (System File C-12-J010-32/10-12-0707 BNR).
2. As a consequence of the violation referred to in Part 1 above. Claimant R. Arcaro shall now be compensated eight (8) hours straight time as it at his appropriate rate of pay.

Facts

Claimant R. Arcaro has established and holds seniority as a Group 2 Machine Operator within the Roadway Equipment Sub-department. On August 7, 2012, the Carrier directed a Track Sub-department Foreman to operate a backhoe to remove and replace a crossing panel at the Illinois Highway 108 grade crossing at Mile Post 56.90 near Atwater Illinois.

Organization Position

The Organization contends that the relevant language of Rule 55 is clear and demarcates the work properly assigned to the Foreman and Machine Operator classifications. Thus, Rule 55B provides that a Foreman is an employee assigned to direct the work of men. Rule 55N states that a Machine Operator is an employee assigned to the operation of machines. In light of the wording of these two Rule 55 Sub-sections, and because it avers that the Track Sub-department Foreman performed no Track Department work on the day in

question, the Organization urges the instant Claim should be upheld and the Claimant be made whole for the loss of work opportunity and to protect the integrity of the Agreement.

The Organization rejects the Carrier's contention that Claimant Arcaro was offered the disputed work via a conference call and chose not to accept the assignment. It points out that other than a copy of an email attributed to Roadmaster B. Barnes there is no evidence in the record that supports the Carrier's assertion in that regard. For that reason, it insists that the Claimant was not offered the subject overtime work ahead of the Track Sub-department Foreman.

Carrier Position

The fulcrum of the Carrier's position is its assertion that in a telephone conference call Roadmaster Barnes offered the disputed work to all of his employees, including the Claimant. It contends that Mr. Arcaro and all of the other bargaining unit employees declined the offer of work. Foreman Piper was the only volunteer for this work opportunity.

The Carrier argues further that BNSF Foremen are working foremen who both operate equipment and supervise their crews. It avers that in the circumstances present on August 7, 2012, it acted properly when, there being other employee willing to volunteer to perform the disputed work it assigned Foreman Piper, who did volunteer, to operate a backhoe. For all of the above reasons, the Carrier takes the position that the Organization has failed to prove an Agreement violation and asks that the instant Claim 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 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

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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.

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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.⁴ 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 Two-Tiered Analytical Paradigm

⁴ 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.

to the Relevant Facts of This Case

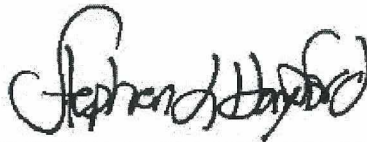
The preponderance of the evidence in the record shows that Mr. Arcaro, along with other Machine Operators, was offered the disputed work and declined the offer. The Claimant's declination of the subject work assignment constituted an exigency that justified the Carrier's decision to assign it to an employee outside the Machine Operator classification. The simple rule that emerges from this finding is that when an employee who is offered a work opportunity and declines that offer, he cannot subsequently claim an Agreement violation.⁵

Award:

The Claim is denied.

Order:

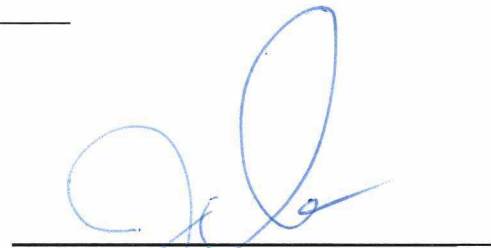
This Board, after consideration of the dispute identified above, orders that the instant Claim be dismissed.



Stephen L. Hayford
Neutral Referee



Zachary Voegel
Organization Member



Joseph Heenan
Carrier Member

Bloomington, Indiana
February 17, 2020

⁵ In light of this holding it is not necessary to address the Carrier's contention that its Foremen are working foremen who routinely work alongside non-supervisory employees.