

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 25/Award No. 25
Carrier File No. 10-13-0102
Organization File No. C-10-J010-2
Claimant: J. Whitehead

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

Statement of Claim

1. The Agreement was violated when the Carrier assigned a Truck Driver, C. Jones, to perform Group 2 Machine Operator work (operate a front end loader and a back hoe) between West Abingdon Mile Post 175.002 and West Avon Mile Post 182.00 and between Bardolph Mile Post 196.002 and Mile Post 197.00 on September 12 and 13, 2012 (System File C-13 J010-2/10-13-0102 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Whitehead shall now be compensated for twelve (12) hours at the applicable Group 2 Machine Operator straight time of pay.

Facts

Claimant J. Whitehead has established and holds seniority as a group 2 Machine Operator in the Roadway Equipment Sub-department. Mr. C. Jones has established seniority as a Truck Driver in the Track Sub-department. On September 12 and 13, 2012, the Carrier assigned Mr. Jones to operate a front end loader and a backhoe between West Abingdon Mile Post 175.002 and West Avon Mile Post 182.00 and between Bardolph Mile Post 196.002 and Mile Post 197.00. Jones spent 12 straight time hours performing those tasks.

Organization Position

The Organization points out that Rule 55P provides in pertinent part that the work of a Truck Driver in the Track Sub-department is operating trucks, stake trucks and school bus type buses, except trucks having a manufacturer's gross vehicle weight of less than

16,000 pounds or any vehicle of the pick-up, panel delivery or special body type. Rule 55N provides that a Machine Operator is an employee qualified and assigned to the operation of machines as classified in Groups 1, 2, 3 and 4 in Rule 5. The Organization notes that Rule 5 lists "backhoe" as a Group Two machine.

The Organization asserts that the above language of Rule 55 is clear and unambiguous. In its view Rule 55N establishes that the disputed work should have been assigned to the Claimant Machine Operator. Therefore, it submits that the instant Claim should be upheld. In order to make Mr. Whitehead whole and protect the integrity of the Agreement as a remedy the Organization asks that he be awarded 12 hours of pay at the applicable pay rate.

Carrier Position

The Carrier contends that the work performed by Truck Driver Jones consisted of loading his truck with rock and driving the truck, as well as removing and replacing ties. It finds nothing in Rule 55N or Rule 55P prohibiting that work assignment. The Carrier observes that the last sentence of Rule 55 P clearly stipulates that a "Truck Driver will perform such other work as may be assigned to him when not engaged in driving the truck." It emphasizes that the term "other work" is not defined or restricted by Rule 55P.

The Carrier avers further that the truck loading work Mr. Jones performed on September 12 and 13, 2012 was within the reach of Rule 78 and was also *de minimis* in nature. Regarding the removal and replacing of ties, the Carrier urges that Machine Operators are not required for that work. Finally, the Carrier maintains there is no proof that Mr. Jones operated the backhoe to remove or install ties.

Based on the contentions summarized above, and because it is convinced that nothing in Rule 55P reserves the work at issue to the Machine Operator classification, the Carrier 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

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

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.

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

Nothing in Rule 55N reserves the work of removing and replacing ties to the Machine Operator classification. However, Rule 55N, and Rule 5 does confirm that the work of

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.

operating "4 Wheel Tractor with both front end loader with at least one-yard bucket or scoop and backhoe" is work properly assigned to Group 2 Machine Operators.

Consequently, the Organization has established *prima facie* proof of a Rule 55N violation with regard to the disputed operation of the backhoe/front-end loader by Truck Driver Jones on the two days in question. Rule 55N says nothing about tie removal and tie placement. For that reason, the Organization has not established a *prima facie* proof of an Agreement violation with regard to those two tasks.

Although the factual record is somewhat unclear, the Carrier's contention that Truck Driver Jones' operation of the backhoe/front-end loader to load rock onto his truck was incidental to his primary work assignment as a Truck Driver is persuasive. In light of the facts attendant to this controversy, it is reasonable to categorize Mr. Jones' use of the backhoe/front-end loader to load rock onto his truck as "other work" incidental to his truck driving work.

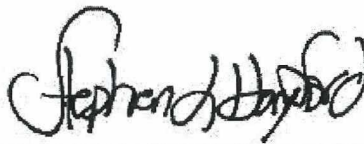
Based on the findings above, the Board has determined that the Organization has failed to prove an Agreement violation.

Award:

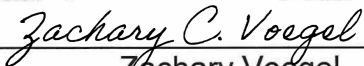
The Claim is denied.

Order:

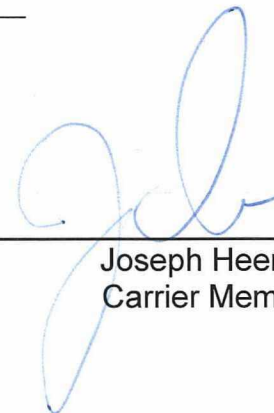
This Board, after consideration of the dispute identified above, orders that the instant Claim be dismissed.



Stephen L. Hayford
Neutral Referee



Zachary Voegel
Organization Member



Joseph Heenan
Carrier Member

Bloomington, Indiana
February 17, 2020

