

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 29/Award No. 29
Carrier File No. 10-10-00328
Organization File No. B-M-2751-M
Claimant: G. Schmeling

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. G. Schmeling to perform rail grinding train duties between Sweetbriar and New Salem on the Dickinson Subdivision, Montana Division on September 12 and 13, 2012 (System File C-13-J010-2 2/10-13-0102 BNR).
2. As a consequence of the violation referred to in Part 1 above, Mr. Whitehead shall now be compensated for twelve (12) hours at the applicable Group 2 Machine Operator straight time rate of pay.

Facts:

G. Schmeling has established and holds seniority in the Track Sub-department. At the time this dispute arose, Mr. Schmeling was assigned as a section Foreman supporting a rail grinding train by obtaining track authority and providing fire suppression. On June 18, 2012, the Carrier assigned a Roadway Equipment Sub-department Group 3 Machine Operator to support a rail grinding train for seven and one-half hours on an overtime basis. Mr. Schmeling was not an opportunity to perform that overtime work.

Organization Position:

The Organization contends that the relevant language of Rule 55 is clear. 55 B provides that a Foreman is an employee assigned to direct the work of men. Rule 55 Q states that the work of Sectionmen in the Track Sub-department is that of constructing, repairing and maintaining roadway in tracking other work incidental thereto. In the Organization's view

these two Rule 55 Sub-sections establish that work of the nature involved here clearly accrues to employees in the Track Sub-department.

Claimant Schmeling is a Track Sub-department Foreman. It insists that because the Machine Operator who was assigned to perform the disputed overtime work is a Roadway Equipment Sub-department employee, the Carrier's action in assigning that machine operator to work in the place of Track Sub-department Foreman Schmeling resulted in a violation of the Agreement.

Based on the arguments summarized above, the Organization takes the position that the instant Claim should be sustained and Claimant Schmeling be made whole for the loss of work opportunity he experienced and in order to protect the integrity of the Agreement.

Carrier Position:

The Carrier asserts that Group 3 Machine Operator Wiege did not work as a Foreman on September 12 and 13, 2012. He simply assisted the rearguard grinding train by obtaining track authority and perform fire suppression/control duties-neither of which is reserved for Foreman or any other Maintenance of Way classification. Neither Rule 55B nor Rule 55N State that the work of assisting a rail grinding train by obtaining track authority and performing fire suppression/control duties is reserved to Foreman or Machine Operators. The Carrier urges further that the Organization has failed to prove that the work at issue is performed, system-wide, by employees in the Foreman classification.

For the reasons summarized above, the Carrier submits that the instant Claim should be rejected by the Board.

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 work/tasks at issue is to be assigned to those employees, 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 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

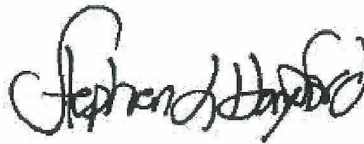
Claimant Schmeling is a Track Sub-department Foreman. Rule 55B states that Foremen are "assigned to direct the work of men and reporting to officials of the railroad" Rule 55B is not worded in sufficiently specific terms to establish a *prima facie* violation of the Agreement. Additionally, the evidence in this particular record indicates that the disputed tasks at issue are assigned to various sub-department employees, including the Roadway Equipment Sub-department. For that reason the Board has determined that the Carrier's action in assigning a Roadway Equipment Sub-department Machine Operator to perform the contested rail grinding train support work did not result in an Agreement violation.

Award:

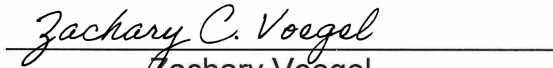
The instant claim is denied.

Order:

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



Stephen L. Hayford
Neutral Referee



Zachary Voegel
Organization Member



Joseph Heenan
Carrier Member

Bloomington, Indiana
February 17, 2020