

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 3/Award No. 3
Carrier File No. 10-10-0048
Organization File No. C-10-J010-4
Claimant: G.Tjaden

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. Tjaden to perform welding duties at Bridge 26.35 on the Beatrice Subdivision, Line Segment 152 on August 20, 21, 22 and 23, 2009 (System File C-10-J010- 4/10-10-0048 BNR); and instead assigned the work to a B&B foreman.
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Tjaden shall now be compensated for eight (8) hours straight time, forty (40) hours overtime and eight (8) hours double-time at his appropriate rate of pay.

Facts:

Claimant G. Tjaden has established and holds seniority within the Welding Sub-department. On August 20-23, 2009, the Carrier directed a Bridge and Building (B&B) Sub-department Foreman to perform welding work at a derailment site at Bridge 26.35, Line Segment 152 on the Beatrice Subdivision. The derailment involved five cars that left the tracks and fell into the river ravine crossed by Bridge 26.35. During the shifts in question Claimant Tjaden was fully employed.

Organization Position:

The Organization asserts that Rule 55K clearly reserves work of the character involved to Welding Sub-department employees. By its test, Rule 55K provides that Welders in the Welding Sub-department shall perform various types welding and welding-related work (e.g., repairing, cutting frogs and switches and tempering rails, etc.). Citing Third Division Awards 7958, 2836 and numerous other similar Third Division and Public Law Board

Awards, the Union maintains there is a “well-established” Rule 55 principle whereby work is reserved for those employees who customarily perform such work in accordance with the terms of the Agreement.

As a Classified Welder Mr. Tjaden customarily and routinely performs welding work like that in dispute. For that reason, and because it believes that the Carrier has presented no valid defense for his challenged actions, the Union insists that a violation of the Agreement transpired on August 20-23, 2009. It asks that Tjaden’s claim be granted and that he be made whole for the loss of work opportunity that resulted from the Carrier’s challenged actions.

Carrier Position:

The Carrier emphasizes there is no dispute that the derailment that led to this dispute was an emergency. It maintains further that the Organization concedes that BNSF has greater latitude in the assignment of work in emergencies, and at those times may assign its forces in a manner that it deems most appropriate. The Carrier acknowledges that in previous Rule 55 Awards this Board has repeatedly stated that Rule 55 provides guidance on job classifications; places some limitations on BNSF’s ability to make job assignments; and designates clear lines of demarcation between the work performed by various crafts. However, Rule 55K does not state that working at a derailment site is reserved to any particular class.

The crux of the Carrier’s position is its assertion that, absent clear language in Rule 55 reserving disputed work to a specific class or craft, the Organization must prove that bargaining unit employees in the Welder class perform the work in dispute system-wide, to the exclusion of all others classes of employees. The Carrier submits that the Organization never refuted its contention that employees in other sub-departments have performed derailment remediation. In other words, this work has never been exclusively performed by welders.

Arguing in the alternative, the Carrier urges that even if the Organization’s claim were to be deemed meritorious, the Claimant would not be entitled to any damages. On the four days in question, Mr. Tjaden was fully employed and he suffered no monetary loss. For that reason because punitive damages are not contemplated by the Agreement, the Carrier submits that no award of monetary relief is warranted here.

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 BMWV 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

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.

Claimant Tjaden is a classified Welder. The work in dispute was welding (and grinding) performed in the course of remediating the damage caused by what was clearly a serious multiple car derailment. That the subject work was performed in the course of a derailment remediation does not alter the nature of the tasks performed by the B&B Sub-department Foreman. Therefore, the Board rejects the Carrier's attempt to characterize the work as "derailment remediation" for purposes of the Rule 55 analysis.

Rule 55 K states:

K. Welder

An employe 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 and Maintenance of Way Structures Department shall be classified as a maintenance of way welder.

The record in this Matter establishes that the work at issue involved welding and welding-related tasks involving the operation of a welding device(s).⁴ Thus, even though a B&B Department Foreman performed those welding and welding-related tasks within the context of a derailment remediation effort, the work clearly falls within the work assigned to Mr. Tjaden's Welder classification.

The Organization has made out a *prima facie* Rule 55 K violation and as a result, the analysis now moves to the Level 2 inquiry. The B&B Department Foreman classification does not normally and customarily perform welding and welding-related tasks. The subject Foreman performed welding and welding-related task for some four days. Therefore, the Rule 78 incidental work exception is not reached here.

At the same time, there can be no real doubt that a five-car derailment resulting in those railcars plunging into a river ravine constituted an emergency that required the Carrier to respond as quickly as possible in order to restore service on the affected rail line. For that reason, the well-established emergency exception to the Rule 55 work assignment scheme was operative on August 20-23, 2009. Therefore, in the Award below this claim will be denied.

⁴ The Organization's Submission refers to the Sub-section L Grinder provision of Rule 55. However, there is no evidence in the hearing record pertaining to the operation of a grinding device, et. al as listed in Sub- section L. Therefore, this analysis will not further address Rule 55 L.

Award:

The Claim is denied.

Order:

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

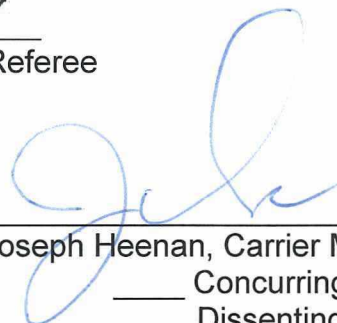


Stephen L. Hayford, Neutral Referee



Zachary Voegel, Organization Member

☐ Concurring
☐ Dissenting



Joseph Heenan, Carrier Member

☐ Concurring
☐ Dissenting

Bloomington, Indiana
February 17, 2020