

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 33/Award No. 33
Carrier File No. 10-10-0017
Organization File No. C-08-03
Claimant: A. Borago and J Sanchez

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. A. Borago and Mr. J. Sanchez to perform Track Sub-department work (unloading and counting ties from the unloading machine) between Mile Post 98.0 and 44.0 near Cheyenne, Wyoming on the Colorado Subdivision beginning on April 7, 2008 and continuing through April 9, 2008 (System File C-08-03/13-08-0017 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimant's A. Borago and J. Sanchez shall not each be compensated for a total of twenty-four (24) hours at their respective straight time rate of pay.

Facts

Claimants A. Borago and J. Sanchez have established and hold seniority as Sectionmen in the Trap Sub- department. On April 7-8, 2008, the Carrier assigned Welding Sub-department employees to unload and count ties from a tie unloading machine between Mile Post 98.0 and 44.0 their Cheyenne, Wyoming on the Colorado Subdivision. From April 7- 9, 2008, the Carrier assigned two Welding Sub- department employees to unload and count ties from the unloading machine between Mile Post 98.0 and 44.0 near Cheyenne Wyoming on the Colorado Subdivision. Those two Welding Sub- department employees each worked a total of 24 straight-time hours.

Organization Position

The Organization contends that the relevant language of Rule 55 is clear. Rule 55Q provides that Sectionmen in the Track Sub-department perform the work of constructing,

repairing and maintaining roadway and track and other work incidental thereto. Rule 55K states that Welders in the Welding Sub-department perform various types of welding, cutting, tempering, etc. Rule 55L provides that Grinders in the Welding Sub-department shall perform all binder operations. The Organization contends these relevant provisions of Rule 55 establish that the work at issue accrues to employees in the Track Sub-department.

The Organization asserts that the Carrier has failed to offer any evidence to rebut its *prima facie* proof that the work of unloading and counting ties is properly assigned to Track Sub-department employees. It rejects as unproven the Carrier's contention that the disputed work required the driving of a vehicle which required the possession of a Commercial Driver's License (CDL). Absent such evidence, the Organization insists that its *prima facie* proof an Agreement violation must stand as unrebutted.

Carrier Position

The touchstone of the Carrier's position is its contention that the disputed work was driving a truck and that task required a CDL, which neither of Claimants possessed. For that reason alone it maintains that the Claims of Messrs. Borago and J Sanchez should be denied.

The Carrier further asserts that Rule 55 does not assign the work of unloading and counting ties to any particular classification(s). It points to the Organization's failure to prove that classified Sectionmen perform that work, system-wide, on an exclusive basis as additional proof that the instant Claim is without merit and must be rejected. If the Claim were to be sustained, the Carrier submits that an award of damages is not warranted because the two Claimants were fully employed during the time at issue.

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 employe that is within the employe's craft. The caveat becomes operative when the employe 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

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 employe(s) is sufficiently clear to indicate the Parties' mutual intent that the work/tasks at issue is to be assigned to those employes.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 employes 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 employe(s) is sufficiently clear to indicate the Parties' mutual intent that the work/tasks at issue is to be assigned to those employes, 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 employe'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 employe(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 employes 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

Claimants Borago and Sanchez are classified Sectionmen. Rule 55Q states that Sectionmen are to be "assigned to constructing, repairing and maintaining roadway and track and other work incident thereto. It is true that the tasks of unloading and counting ties is work related to maintaining track. However, that very general description of the Sectionmen's work realm does not establish that the Parties mutually intended that only Sectionmen are to perform the disputed work. Accordingly, the Board has determined that the Organization has not made out a *prima facie* violation of the Agreement.

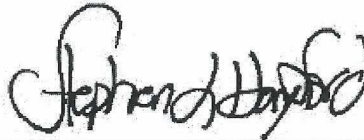
Consequently, the instant Claim can be sustained only if the Organization has proven that, system-wide, and to the exclusion of all other classifications, Sectionmen perform the work of unloading and counting ties. It has failed to adduce that proof and as a result the instant claim can only be denied.

Award:

The Claim is denied.

Order:

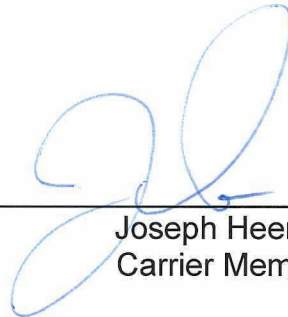
This Board, after consideration of the dispute identified above, orders that the instant Claim be dismissed.



Stephen L. Hayford
Neutral Referee



Zachary Voegel
Organization Member



Joseph Heenan
Carrier Member

Bloomington, Indiana
February 17, 2020