

PUBLIC LAW BOARD NO. 7738

Ex Parte Case No. 5/Award No. 5
Carrier File No. 10-10-00130
Organization File No. C-10-J010-12
Claimant: R. Reimers

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

Statement of Claim:

1. The Agreement was violated when the Carrier failed to assign Mr. R. Reimers to perform welding duties (cut off pilings and well On Two Pilings) at Bridge 139.84 on the Napier Subdivision, Line Segment 16 on October 7, 2009.
2. Because of the violation referred to in Part 1 above, Claimant. R. Reimers shall now be compensated ten (10) hours straight time and two (2) hours overtime at his appropriate rate of pay

Facts:

Claimant R. Reimers has established and holds seniority in the Welding Sub-department. Mr. Reimers was regularly assigned and worked as a Head Welder. Employee D. Kirkpatrick has established seniority in the Bridge and Building (B&B) Sub-department and on the days involved here, he was regularly assigned as a First-Class Carpenter.

On October 7, 2009, the Carrier assigned Mr. Kirkpatrick to perform work involving the cutting off of pilings and welding caps on two pilings at Bridge 139.84 on the Napier Subdivision, Line Segment 16. Bridge 139.84 is a wooden bridge.

Organization Position:

The Organization asserts that Rule 55K clearly reserves work in dispute 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 reserving work for those employees who customarily perform such work in accordance with the terms of the Agreement. It submits there can be no question that cutting off pilings and welding caps onto pilings on a bridge renewal project specifically accrues to employees in the Welding Sub-department and in particular, to the Claimant who at the time in dispute was working as a Head Welder.

The Organization contends that the Carrier's challenged actions constituted a clear and unmistakable violation of Rule 55 of the Agreement. It notes there is no dispute that the B&B Sub-department First Class Carpenter performed the contested work on the claimed date. For that reason, and because it asserts that the Carrier has offered no valid defense to the instant Claim, the Organization submits that the Claim must be sustained.

Carrier Position:

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, the Carrier asserts that, absent clear language in Rule 55 reserving disputed work to the Claimant's Welder classification a specific class or craft, the Organization must prove that bargaining unit employees in the Welder classification perform the work in dispute system-wide, to the exclusion of all others classes of employees.

The Carrier contends that the Organization has failed to prove that Rule 55 forbids the assignment of a First Class Carpenter to perform the subject renewal work on this wooden bridge. It points to the language of Rule 55F, which speaks to the work performed by employees in the First Class Carpenter job classification

An employee assigned to construction, repair, maintenance or dismantling of buildings or bridges, including the building of concrete forms, erecting false work, etc. He shall be a skilled mechanic in house and bridgework and shall have a proper kit of Carpenter tools sufficient to carry out the work employed upon, except such tools as are customarily furnished by the Company.

The Carrier further notes the language of Rule 55K, which describes the work performed by employees in the Welder classification.

An employee 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.

Neither of the above-quoted relevant provisions of Rule 55 reserve the work of renewing bridges to employees in the Welder classification. At the same time, Rule 55K states that First Class Carpenters are assigned to perform "construction, repair, maintenance or dismantling of brick buildings or bridges."

Because Rule 55F and Rule 55K do not clearly reserve the work at issue to the Welder classification, the Carrier avers that the organization must prove that classified Welders, to the exclusion of all other classifications, perform bridge renewal work system-wide. It insists that the Organization has not proven that fact, and as a result, the Board should deny Mr. Reamer's claim.

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 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 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.

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.

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 Organization's *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

Scrutiny of the texts of Rule 55K and Rule 55F shows that both bridge renewal work of the type at issue here falls within the bailiwicks of both classified Welders and classified First Class Carpenters. Rule 55 K confirms that Welders are assigned "welding and cutting in connection with construction, *maintenance and dismantling of bridges*"; while Rule 55 F First Class Carpenters are employees assigned, *inter alia*, to the "construction, repair, maintenance or *dismantling of . . . bridges*" (emphasis added).

Thus, it is clear that the Parties mutually intended that the Carrier can properly assign both classified Welders and Classified First Class Carpenters to perform bridge renewal work. The evidence in the hearing record pertaining to the work at issue is imprecise, establishing only that it consisted of cutting off pilings and welding caps onto pilings on a bridge renewal project. Because the subject bridge's pilings are made of wood, it is not

clear how a Welder would use a welding device to cut those wooden pilings. Furthermore, it is not clear how caps were joined to those wooden pilings.

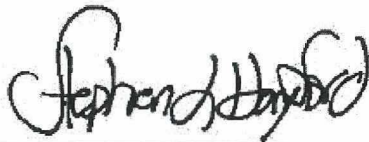
In light of the above findings, the Board can only find that the Organization has failed to establish *prima facie* proof of a Rule 55K violation. In the Award below, Mr. Reimer's claim will be denied.

Award:

The Claim is denied.

Order:

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

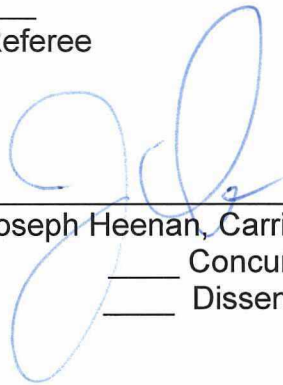


Stephen L. Hayford, Neutral Referee



Zachary Voegel, Organization Member

☐ Concurring
☐ Dissenting



Joseph Heenan, Carrier Member

☐ Concurring
☐ Dissenting

Bloomington, Indiana
February 17, 2020