

PUBLIC LAW BOARD NO. 7738

**Case No. 1 /Award No. 7
Carrier File No.: 10-10-0414
Organization File No.: C-10-J010-48
Claimant: David A. Janulewicz**

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES DIVISION - IBT RAIL
CONFERENCE**

-and-

**BNSF RAILWAY COMPANY
(former Burlington Northern Railroad Company)**

**STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
that:**

1. The Agreement was violated when the Carrier assigned Welding Sub-department Welder S. Juchter to perform Track Sub-department track work of replacing ties with the 38th Street Section Crew between Mile Posts 14 and 15 on the Golden subdivision in Golden, Colorado on June 1, 2010 (System File C-10-J010-48/10-0414 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Janulewicz shall now be compensated for (8) hours at the applicable straight time rate of pay and four and one-half (4.5) hours at the applicable overtime rate of pay."

FINDING

The Board finds that the Parties herein, Carrier and Claimant are within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of the parties and the subject matter.

The Claimant, D. Janulewicz hold seniority as a Sectionman, in the track Sub-department. On June 1, 2010, the Carrier assigned Welding Sub-department employee, S. Juchter to perform Track Sub-department work at the Golden Subdivision in Golden, Colorado. The Organization submitted a claim on behalf of the Claimant and alleged a violation of the Collective Bargaining Agreement.

The Organization maintains that the Carrier has regularly assigned the removal and installation of track crossties to Track Sub-department employees. The Organization insists that the assignment of Welding Sub-department employees to perform Track Sub-department work was a clear violation of the Agreement. The Organization specifically points to Rule 1 Scope, Rule 2 Seniority Rights and Sub-Department Limits, Rule 5A, Seniority Roster, and Rules 55 Classification of Work, as being violated. In support of its position, the Organization cites several NRAB Third Division Awards to support their interpretation of the above Rules.

The Organization further maintains that the Claimant loss a work opportunity to install and remove track crossties. As a remedy, the Organization, claims that the Claimant is entitled to be compensated for eight (8) hours of straight time rate and four and one-half (4.5) hours at the overtime rate.

The Carrier contends that the issue is an intra-craft dispute, thus the Organization must establish that "the disputed work has been exclusively performed by the claimants on a system-wide basis." The Carrier states that the Organization failed to meet its burden to establish exclusivity or any past practices to support its claim. The Carrier cites Rule 78, Intra-Craft Work Jurisdiction to support its position that it was permissible under the Agreement to assign the work to a n employee in the Welding Sub-department. The Carrier insists that there is no Rule within the Agreement which reserves any work to employees and the Rules cited by the Organization do not support their reservation arguments. The Carrier cites several past arbitral precedents to support its position.

After careful review of the record, the Board finds that the evidence presented by the parties establish that the Carrier violated the Agreement by assigning S. Juchter to perform Track Sub-department track work, instead of the Claimant on the dates in question. Both parties submitted a wealth of documents and detailed analysis on several Rules in the Agreement. The evidence within the record supports the conclusion that the assignment of the Welding Sub-department employee to perform Track Sub-department work violated Rule 55. The Organization also cites Rules 1, 2, and 5 to support their position. But It is Rule 55 which is dispositive of the issues before this Board. Rule 55 states, in part:

RULE 55 CLASSIFICATION OF WORK

K. Welder-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, building and other structures, and any other welding and cutting in the Maintenance of Way Structure Department shall be classified as a maintenance of way welder.

Q. Sectionmen- Employees assigned to constructing, repairing and maintaining roadway and track and other work incident thereto...

The application of Rule 55 clearly defines the various classifications of work. Specifically, Rule 55 K defines the work of Welders and Rule 55 Q defines the work of Sectionmen. Rules 1, 2, and 5 further illustrate how the division of work is defined in the Maintenance of Way and Structure Department. The duties of Welders and Sectionmen are distinct and different. The work to be performed was for a Sectionman. Moreover, the work performed was work normally performed by Sectionmen, and not Welders.

Without doubt, the Carrier has the right to make job assignments. However, there are limits. Those limitations have been negotiated by the parties and incorporated into a collective bargaining agreement. In this case, Rules 1, 2, 5, and 55 are among the provisions of the agreement which not only provides guidance on job classifications but also places some limitations on the Carrier's authority to make job assignments. Specifically, the language in the contract provides for classification of work, seniority rosters, and seniority rights. These provisions support the Organization's position that there are clear lines of demarcation between the work performed by the various crafts. The contract does permit some marginal overlapping of job functions that are incidental to the work that each craft is permitted to perform. But here, on the dates in question, the Welders were performing the entire functions of a Sectionman. In other words, the Welder was performing tasks which are customarily performed by Sectionmen.

The Board findings are in line with other NRAB Third Division Awards. (See, Organization's Exhibit "E") For example, the application of these Rules were analyzed in NRAB Third Division Award 35961 where the fact pattern is almost identical to the instant case. In that Award, the Board determined that the Carrier's assignment of Welders to perform track work violated the contract. The Board stated that the "Organization carried its burden of proof and the Carrier's 'incidental work' defense was not persuasively established." The Board in Award 35961 further held that "...the Carrier simply used the Welders to perform large scale track work of a magnitude to which the Claimants were contractually entitled by custom, practice and tradition under Rules, 1,2,5, and 55 of the Agreement." (See, Organization's Submission). Similar to the facts in this grievance, the Carrier simply assigned the Welder to perform track work which customarily is assigned to employees in the Track Sub-department which was in violation of the Agreement.

The Board concludes that the Carrier violated Rules 1, 2, 5 and 55 of the Agreement, when it assigned Welding Sub-department employees to perform Track Sub-department work on June 1, 2010. The Board's findings are based on the clear and plain language of Rules 1, 2, 5 and 55.

The Carrier has argued that the Organization has failed to establish exclusivity under Rule 78. Rule 78 states:

RULE 78. INTRA-CRAFT WORK JURISDICTION

Employees will be allowed to perform incidental tasks which are directly related to the service being performed and which they are capable of performing, provided the task are within the jurisdiction of the BMWE. Compensation shall be at the applicable rate for the employee performing the service and shall not constitute a basis for any time claims by other employees. This provision is not intended to alter the establishment and manning of work forces accomplished in accordance with existing assignment, seniority, and scope and classification rules.

It is clear from Rule 78 that within the various crafts they may complete a task of each other so long as it is "incidental". The key term in Rule 78 is "incidental". The plain meaning of the term relates to a function that is minor, not major but is *de minimis* in nature. Here, the record reflects that the Welder performed the entire functions of a Sectionman. Clearly, the work performed by the Welder was not incidental to the work normally performed by Sectionmen. There is no doubt that the Rule 78 permits the Carrier to make assignments among the crafts, however, there are limitations.

The Board agrees with the Carrier that had this purely been a claim of exclusivity, the Organization would have had a heavy burden to carry as outlined in several of National Railway Adjustment Board Third Division Awards, as set forth in the Carrier's Submission. However, the Board has determined that this case can also be resolved based on the restrictive language within Rule 78 which places limitation on assignments within craft positions, and Rule 55.

As stated in National Railway Adjustment Board Third Division Award, 40106:

Contrary to the position set forth by Carrier, because the disputed work is covered by 55, and is not "incidental" to the work of the Machine Operators, the Organization need not show the exclusive past performance by its members. (Organization's Submission Exhibit "F")

The Board recognizes that the analysis in National Railway Adjustment Board Third Division Award, 40106 has not been totally accepted by other Boards. However, its logic and application to the facts here, lends itself to supporting a rational conclusion in this Award. The facts in this claim clearly show a Welder performing tasks normally assigned to Sectionmen. If employees are permitted to perform job assignments which are not in their classification, and those tasks are not incidental to their classification, Rules 55 and 78 would be null and void. The Board concludes that whether it bases its findings on Rules

55 or 78, the evidence in the records clearly supports the conclusion that the Carrier is prohibited from unilaterally assigning work from one class of employees as designated under Rule 55, to another class of employees, unless there is a permissible exception to the above Rule.

The Carrier also argues that the Organization failed to prove that Rules 1, 2, 5, and 55 reserved the work in question to the Claimants. The Carrier cited several on-property awards which determined that these Rules do not reserve work for employees. The Board agrees that these Rules do not specifically state that certain work is reserved to certain employees. However, a combination of these Rules can reasonably support the Organization's interpretation that work performed by the Welders violated the agreement.

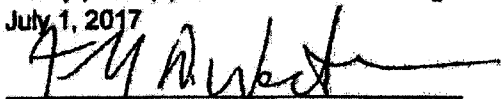
The clear and plain language within the text of each Rule and the combined application of each Rule supports the Organization's interpretation that the work was reserved for Sectionmen not Welders. Moreover, the basic contract interpretation principle which applies here states that a contract should not be interpreted in a manner which would result in a "harsh or nonsensical" outcome. The Carrier's interpretation of these Rules would result in management having the authority to assign craft employees to perform any tasks outside their classification in violation of Rule 55 and the seniority provisions of the Agreement. Surely, this could not have been the intentions of the Parties.

With respect to damages, as requested in Part (2) of the claim, the Board recognizes there are different views with respect to awarding straight time and/or over time to a claimant, if they worked during the time in question. The Organization does not dispute that the Claimant worked on the dates in question. This Board takes the view that the Claimant "lost his rightful opportunity to perform the work and is entitled to a monetary claim." The Carrier should not escape its responsibility to make the Claimant whole. This includes compensating the Claimant for the right to work in his classification as required by the Agreement. Based on these principles, this Board follows the view cited in several NRAB Awards which have reached similar conclusions. See, NRAB Third Award 35477.

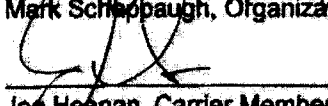
AWARD:

Part (1) and (2) of the Claim of the Organization is Granted.

July 1, 2017


Floyd D. Weatherspoon, Neutral Member

 7/14/2017
Mark Schoppaugh, Organization Member


Joe Heenan, Carrier Member

Dissenting Opinion to Follow