

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42180
Docket No. SG-42260
15-3-NRAB-00003-130225**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J. W. Ritchie, for assignment to permanent position S3014, account Carrier violated the current Signalmen's Agreement, particularly Rules 22, 35, and 41 when it refused to award the Claimant this position after receiving his bid, and instead awarded the position to an employee junior to him. Carrier's File No. BRS-2011-35-010459. General Chairman's File No. 11-059-BNSF-20-C. BRS File Case No.14776-BNSF.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

When this dispute arose, the Claimant was a Signal Maintainer at East Dubuque, Iowa. In the October 3, 2011 bidding cycle, he bid on two positions – a temporary CTC Maintainer position (S4078) and a permanent Signal Construction Forman position

(S3014). According to the Local Chairman's letter to the Carrier of December 8, 2011, the Claimant had called the Manpower Department and indicated that he wanted to bid on and be awarded a temporary position and a permanent position in the same round of bids. Mr. Elkins advised the Claimant that per his (Elkins') interpretation of Rules 35.A and 35.B, the Claimant could not be awarded the two positions simultaneously. The Claimant submitted bids for both positions nonetheless. Employees who bid on multiple positions must indicate their order of preference among the positions. The Claimant indicated the temporary position as his first preference. When the bids were awarded, the Claimant was assigned to the temporary position, while a junior employee was awarded the permanent position.

The Organization filed this claim, alleging that the Carrier violated Rules 22, 35, and 41 of the Parties' Agreement when it awarded the permanent position that the Claimant had bid on to a junior bidder. According to the Organization, both under the Agreement and by past practice, employees have been allowed to bid on and be awarded temporary and permanent positions at the same time: the employee works the temporary position until it ends and then moves to his permanent position. The Organization explained its understanding of employees' rights under Rule 35 in an Attachment to the Local Chairman's letter from Mike Dake, then General Chairman. After referring to comments from a previous Manpower Planner for Signal, who confirmed the Claimant's understanding of how Rule 35 has been interpreted in the past, Dake continued:

"Rule 35 does allow an employee to hold both a permanent and a temporary position at the same time. By that same token, it is permissible for an employee to place a bid and be assigned to each in a bulletin cycle. Rule 35 B contemplates an employee holding a temporary and a permanent position and bidding on another permanent or temporary position. Both type[s] of position are considered separate and distinct. If the employee bids a new temporary, he moves to the new position and forfeits his old temporary position. If he bids a new permanent position, he can remain on his temporary or he can go to his new permanent position, but he gives up his prior permanent position. The same would be true for Mr. Ritchie. He can hold both a temporary and [a] permanent position and certainly could bid a new permanent position while bidding a temporary position. If he is the senior bidder on both, he would be assigned the new permanent position and assigned and report to the new temporary position. His old permanent position would come out for bid as permanent and his new permanent position would be bulletined as temporary."

According to Dake, the Agreement had been interpreted that way by the Carrier since at least 2000, until the arrival of new personnel in the manpower office.

The Carrier submits first that the claim was untimely, in that the Organization had notice as early as 2008 of its interpretation of Rule 41.E limiting employees to being awarded only one position in a bulletin cycle, and this claim was not filed until the end of 2011. Second, the Claimant indicated his preference between the two positions as required by Rule 41.E of the Parties' Agreement, and he was awarded his first choice. Rule 41.E does not ask employees to state their preferences (plural) for both temporary and permanent positions. None of the Rules cited by the Organization make any reference to separately bidding both temporary and permanent bulletined positions in the same bid cycle. If the drafters of Rule 35 had intended to permit employees to bid both temporary and permanent positions in the same cycle, they would have said so. But there is no mention in the Agreement of how an employee who places bids on both temporary and permanent assignments in one bulletin cycle will be handled. Nor is there evidence of any binding past practice regarding the assignment of permanent and temporary positions to the same individual during a single bulletin cycle. The Organization has not bargained for the right of employees to bid and be awarded multiple positions from one bulletin cycle, and the Carrier has no contractual obligation to permit employees to do so.

The Carrier has made a procedural objection, that the claim was untimely filed. The fact that the Organization knew about the Carrier's interpretation of Rule 41 several years before filing a claim is not necessarily an impediment to this claim being filed when it was. If no employee complained about the interpretation, there was no claim for the Organization to file. The Organization has to have an actual Claimant with a real complaint; it may not file claims based on mere speculation or suspicion about how the Carrier might interpret some provision of the Agreement. In the absence of prior claims having been filed regarding the issue, the Organization had the right to file this claim within the time limits set forth in the Agreement, which it did.

Turning to the substance of the claim, the issue before the Board is whether an employee holding a permanent bid position may bid on and be awarded both a new permanent bid position and a temporary assignment at the same time. Rule 41.E, relied upon by the Carrier, states: "When an applicant applies for more than one position on the same bulletin he must indicate on his application his order of preference." This provision, the Carrier reasons, implies that an employee may only be awarded one of the positions he applies for; in accordance with Rule 41.E, the Claimant was awarded his first preference, the temporary position, and there was no violation of the Agreement. Rule 41, however, does not distinguish between bids for temporary positions and bids for permanent

positions; it is silent in that regard. The bid form similarly makes no distinction between bids for temporary positions and bids for permanent positions.

This is in contrast to Rule 35, Temporary Position or Vacancy, on which the Organization relies. Rule 35 states:

- “A. An employee assigned to a temporary position or an employee filling a temporary vacancy, will when released, return to the permanent position held immediately prior to such assignment unless it has been abolished or it has been filled by a senior employee in the exercise of displacement rights
- B. When such an employee as referred to in paragraph A of this rule has meanwhile become the successful applicant on a bulletined permanent position, he shall not be required, at the expiration of the temporary assignment, or when assigned to the new permanent bulletined position acquired subsequent to being assigned to the temporary position, to return to his former permanent position but instead shall return to the last permanent bulletined position to which he had been assigned. Employees holding permanent bulletined positions and who bid for and are assigned to another temporary position, shall relinquish all rights to the temporary position he vacates.”

Rules 35 clearly anticipates that employees may, in effect, hold both permanent and temporary positions at the same time. Under Rule 35.A, employees in temporary positions have the right to return to the permanent positions they held immediately before assuming the temporary position (unless the permanent position has been abolished or they have been displaced). Thus, while an employee is working a temporary assignment, his permanent position is held for him to return to once the temporary assignment has ended. His permanent position may itself be temporarily assigned to someone else while he is on his temporary assignment, but when he is released from the temporary assignment, he returns to his original permanent position. The employee does not actually work two positions at once, but he holds rights to two positions simultaneously: he actually works the temporary position and at the same time has a right of return to his permanent position.

The first sentence of Rule 35.B contemplates that employees in temporary positions may bid on new permanent positions while on temporary assignment: it provides that employees in temporary positions who successfully bid on new permanent positions are

not required to return to their prior permanent position as set forth in Rule 35.A. Instead, when the temporary assignment expires or “when assigned to the new permanent bulletined position acquired subsequent to being assigned to the temporary position,” the employee “shall return to the last permanent bulletined position to which he had been assigned,” to wit, the new permanent position. The second sentence of Rule 35.B indicates that employees holding permanent positions who are assigned to temporary positions may bid on other temporary positions; if successful, the employee has to relinquish all rights to the original temporary position when he vacates it. According to the Organization, there has been a longstanding past practice of permitting employees to bid on both temporary and permanent positions at the same time.

Under Rule 35.B’s first sentence, an employee assigned to a temporary position may bid on a new permanent position while on the temporary position. Under Rule 35.B’s second sentence, an employee holding a permanent position but assigned to a temporary position may bid on a new temporary position.

Neither Rule 41 nor Rule 35 expressly addresses the issue in this case, whether an employee in a permanent bid position may bid upon and be awarded both a temporary and a permanent position in the same bulletin cycle. From the Organization’s perspective, if employees can occupy two positions at the same time – one permanent and one temporary – they should be able to bid on two positions at the same time. The Claimant here was on a permanent position. He wanted to bid on a new permanent position and a temporary position at the same time, with the idea that he would report initially to the temporary position and when that assignment was complete, he would report to his new permanent position. Rule 35, however, refers expressly to employees who are already on temporary positions.

The Organization contends that it had been a practice for at least eight years to permit employees to bid simultaneously on both permanent and temporary positions and be awarded both positions. But the record indicates that the Organization had known for four years before this claim was filed that the Carrier interpreted Rule 41.E to mean that while employees could bid on multiple positions in a bid cycle, they had to indicate their order of priority and would be awarded only one position in a cycle. The record indicates that in July and October 2008, union officials contacted the Carrier to object when it failed to award multiple positions to an employee and that the Parties continued to discuss the issue for several years, until this claim was filed. If there was a practice prior to 2008, it lapsed when the Carrier stopped awarding “double bids” and the Organization had notice of the Carrier’s interpretation of the Agreement but did not file a claim. To be binding, a past practice must be of long standing, known to both parties, and routinely

implemented, essentially as a standard operating procedure. If that had been true in the past, matters changed in 2008 and the practice was discontinued.

In addition, prior to bidding on the two positions in this case, the Claimant had a conversation with someone in the Manpower Department who told him that he would not be awarded both. So he had personal notice of the Carrier's interpretation and indicated his preference for the temporary position, which he was awarded. He could have bid on the permanent position and filed a claim for being denied the opportunity to bid on and be awarded the temporary position.

Considering the record as a whole, the Board concludes that the Organization has not met its burden to establish either that the language of Rule 35 compels the Carrier to award both permanent and temporary positions to employees in the same bulletin cycle, or that there was an established past practice in existence at the time the Claimant bid on two positions in October 2011. Accordingly, the instant claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of October 2015.