

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42601  
Docket No. SG-42259  
17-3-NRAB-00003-160118**

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. F. Kant, for immediate assignment to a Signalman’s position on the Kansas Seniority District based on his bidding preferences relating to the positions advertised by bulletin S1110B, account Carrier violated the current Signalmen’s Agreement, particularly Rule 41, when, on October 31, 2011, it did not assign him to one of the two positions advertised by said bulletin. Instead, Carrier indicated that “no bids were received.” In addition, Carrier should be compelled to provide the Claimant a seniority date of October 31, 2011, on the Kansas Seniority District roster as well as the compensation provided for in Rule 41 beginning 15 days from October 31, 2011, the date of bulletin S1110B’s Assignment Notice, and continuing until this dispute is resolved. Carrier’s File No. 35-12-0014. General Chairman’s File No. 11-058-BNSF-119-D. BRS File Case No. 14860-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.**

**At the time this dispute arose, the Claimant was a Signalman assigned to Signal Crew SSCX0174 on the Denver Seniority District. In October 2011, he bid on several Signalman positions on the Kansas Seniority District (Positions S6315, S6382 and S6329). The Carrier did not assign him to any of the positions on which he bid and in fact listed them as “no bids received.” The Organization filed this claim by letter dated December 15, 2011, contending that the Carrier’s failure to award one of the positions to the Claimant violated Rule 41 of the parties’ Agreement, specifically Paragraph H; it seeks compensation for the Claimant as provided for in Rule 41, plus a seniority date on the Kansas Seniority District roster of October 31, 2011, the date of Bulletin S1110B’s Assignment Notice.**

**According to the Organization, Rule 41(H) provides four methods to fill an advertised position from among all the bids submitted. First preference goes to senior qualified applicants in the district where the position is advertised. Second is an Assistant Signalman working in the district where the position is advertised who has completed a sufficient part of the training program. Third, the senior qualified employee from a different district who desires to transfer into the district where the position is advertised should be assigned. Fourth, the position may be filled by the Carrier from such source as it deems proper. There were no bidders from the Kansas Seniority District on the positions that Claimant bid on. Claimant was in the third category set forth in Rule 41(H) and should have been assigned one of the positions on which he bid. The Carrier’s assertion that Rule 25 relieves it of its contractual obligation to permit employees to transfer from one district to another is incorrect: Rule 25 is completely separate from Rule 41 and deals with employees working on a different seniority district while they are on furlough. Moreover, the Carrier’s position that all transfers not under Rule 25 have been done pursuant to Carrier policy and not contractual obligation lacks merit; there is evidence in the record that establishes that there have been many successful transfers made under Rule 41 over the years. Where there were no bidders within the seniority district, the positions were re-advertised as “System Wide” and then assigned to the senior bidder in compliance with Rule 41(H). The Carrier acknowledged an employee’s right to transfer when it warned employees who bid positions in a different seniority district: “Important! Being assigned to a position, not on your seniority district and without prior rights, could result in forfeiting current seniority.” Employees who transfer from one**

seniority district to another lose their district seniority in the district they are transferring out of and have to accrue district seniority in their new district from the beginning. Only after this claim and others were filed did the Carrier issue a policy that it claims has governed all seniority district transfers since the inception of the Agreement; this is nothing more than an attempt by the Carrier to justify its clear violation of the Agreement. The language of Rule 41 is clear, and even if it were not, the parties' past practice is the best indicator of the parties' original intent. There is clear evidence dating from at least 2005 of a past practice on Rule 41(H) in accordance with the Organization's position. Seniority is one of the most highly recognized and important benefits that employees covered under the Agreement have. The Claimant here was denied his contractual right to be awarded a district transfer based on his seniority—he was the highest seniority off-district bidder on two positions on the Kansas Seniority District that had no bidders from that district and he should have been awarded one of the positions.

The Carrier contends that there is only one provision in the Agreement that requires the Company to permit seniority district transfers, and it is Rule 25, not Rule 41(H). Rule 41(H) only defines how eligible employees will be assigned to bulletined positions and vacancies. Claimant's seniority was not violated when he was not awarded a position on the Kansas Seniority District, because he has no seniority on the Kansas District. Per the Agreement, his seniority is restricted to the Denver Seniority District. Contrary to the Organization's assertions, Rule 25 is the only location in the Agreement that defines the "applicants for transfer from other seniority districts" mentioned in Rule 41(H). The authors of the Agreement understood the basic principles of contract construction. By addressing seniority district transfers in one Rule and defining the circumstances under which they would be allowed, the parties implicitly excluded any others. The Board has upheld this principle in prior awards. The language of Rule 25 is clear. Contrary to the Organization's assertion, it does contain a method for filling bulletined positions: the employee must file a written application for transfer with the Regional Signal Engineer. Rule 41(H) specifically identifies this group of employees as well as defining the order of precedence when positions are being awarded. Moreover, Rule 41(H) does not require employees to forfeit seniority immediately upon transfer into another seniority district; that language is in Rule 25. Any past transfers were permitted by Carrier policy, and were not in any way a contractual obligation under the Agreement. Such employees are effectively being "hired" on a new seniority district and clearly would no longer have the right to retain seniority on another seniority district. Rule 41(H) contains no language on how seniority will be handled in these situations. Nor did the Organization provide any actual evidence of a "multitude" of employees transferring under Rule 41. The bulletins submitted by the Organization into the record were samples

based upon standard bulletins for Maintenance of Way positions, which are governed by a different Agreement. The parties were unable to agree on modifications to the sample bulletins and the format was discarded and never adopted or implemented. They do not prove that an agreement existed between the parties on the application of Rule 41(H) regarding seniority transfers, nor do they establish a past practice. Rule 25 is clear, and past practice cannot be used to vary or explain the meaning of clear language. The Carrier has very specific hiring needs on each seniority district; therefore, when an employee is hired on a specific district, it is because he or she is needed on that district and not another. The fact that a position has been bulletined does not mean that the Carrier is required to fill it; positions can be abolished or bulletins canceled after a bulletin closes but before it is awarded. Signal Department management has for many years permitted non-furloughed employees to transfer seniority districts at management's discretion, not by contractual obligation. This could mean obtaining approval from both managers affected by the transfer or bulletining a position system-wide. However, due to changes in the Carrier's ability to furlough and the requirement of a minimum staffing level for signal employees, Signal Department management had determined that any seniority district transfers not governed by Rule 25 must be supported by an actual business need. Transfers are a matter of policy and whether they are approved is solely at the Company's discretion and based on its needs. Nor did the Carrier fail to honor Claimant's seniority in denying his bids. Rule 22 makes it clear that seniority is restricted to a single seniority district and has no applicability on another seniority district. When the parties intended to allow seniority to be exercised outside of one's seniority district, specific language was included in the Agreement to that effect. Moreover, the examples submitted by the Organization were all positions that had been bulletined system-wide. The Construction Signalman assignments at issue here were not bulletined system-wide. In addition, this claim was filed outside the appropriate time limits: the Organization knew about the Carrier's interpretation of Rule 41(H) well before this dispute originated. Finally, the Organization failed to prove any damages.

Rule 41, Bulletin and Assignment, states, in relevant part:

“A. Bulletins covering positions or vacancies shall be of standard form showing title of position, headquarters, rate of pay, hours of service, rest days and whether position is permanent or temporary. Bulletins shall be dated and mailed on the 1<sup>st</sup> and 16<sup>th</sup> of each month, or of the first work day thereafter if such date should fall on other than a work day.

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D. Bulletins advertising new positions or vacancies and assigning positions to the successful applicants will be furnished all employees entitled to consideration in filling the position, with copy to the General Chairman.

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H. If there are no qualified applicants, including an employee who has completed a sufficient part of the training program, and no applicants for transfer from other seniority districts such position may be filled by the Carrier from such source of supply as it deems proper.”

The Organization interprets Rule 41(H) to establish a priority of assignment among bidders. Qualified applicants already employed in the seniority district with the vacancy have first preference to the position.<sup>1</sup> Next in line are employees from other seniority districts who want to transfer into the seniority district with the vacancy. If there is no qualified bidder within the seniority district or elsewhere within the Company, the Carrier is then free to fill the position “from such source of supply as it deems proper.” As interpreted by the Organization, the language “and no applicants for transfer from other seniority districts” permits a qualified employee from one seniority district to bid on a position in a second seniority district and, if no bids are received from qualified employees already in the second seniority district, to be awarded the position and to transfer to the second seniority district. That is, a “second-tier” applicant is entitled to consideration and, if qualified, an award of the position before the Carrier may go to the “third tier” and fill the position “from such source of supply as it deems proper,” including outside candidates.

The Carrier reads Rule 41(H) more narrowly, tying it to Rule 25, “Preference To Employment,” which establishes a preference for employees laid off in one seniority district to transfer temporarily to another seniority district upon application to the Regional Signal Engineer. Rule 25, Preference to Employment, states, in relevant part:

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<sup>1</sup> Per Rule 41(H), the phrase “qualified applicants” also includes employees “who [have] completed a sufficient part of the training program. . . .” Rather than addressing applicants from the advertising seniority district as two categories of applicants, this Award will simply refer to both groups (those already qualified and those who have “completed a sufficient part of the training program”) as “qualified applicants.”

**“Employees laid off by reason of abolition of positions, will, upon written application to Regional Signal Engineer be given preference for employment on other seniority districts in accordance with their relative seniority, fitness and ability. Such employees, will, when recalled, be required to return to service on their home seniority district and failing to do so as provided for in Rule 29 will forfeit seniority thereon. Employees thus forfeiting seniority on their home district will acquire seniority on the seniority district on which they are employed as provided in Rule 22 . . . .<sup>2</sup>”**

According to the Carrier, Rule 25 is the only express reference in the Agreement to transfer rights between seniority districts, and Rule 41(H)’s reference to “applicants for transfer from other seniority districts” should be strictly interpreted to apply only to applicants for transfer under Rule 25.

After reviewing all of the evidence in the record, the Board concludes that the Organization’s interpretation of Rule 41(H) is the correct one.

To begin, one of the fundamental principles of contract interpretation is to give the words of a contract their ordinary meaning. Rule 41(H) refers simply to “applicants for transfer from other seniority districts,” without limiting the phrase to applicants for transfer per Rule 25 or to furloughed employees. Rule 41 addresses “Bidding and Assignment,” and under the Organization’s interpretation, paragraph (H) sets forth a logical progression regarding how bid positions should be filled, one that covers all contingencies. The Carrier may fill a position with an outside applicant only after it has considered applications from the preceding categories of applicants. First preference is given to individuals already working in the seniority district. The next tier expands to other employees already working for the Carrier, albeit in other seniority districts. Only after existing employees have had an opportunity for their bids to be considered does the circle expand even further, with the Carrier having the right to fill the position “from

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<sup>2</sup> Rule 22 states, in relevant part:

A. Seniority shall consist of rights based on relative length of service of employees as hereinafter provided . . . . Seniority shall be confined to seniority districts as described in Rule 21 of this Agreement.

B. Seniority begins at the time an employee’s pay starts in the seniority class and district in which employed, . . .

such source of supply as it deems proper.” On its face, the most obvious and reasonable interpretation of Rule 41(H) permits employees to bid on positions in other seniority districts and requires the Carrier to consider these “second tier” applications before going to the third “tier” or leaving the position unfilled.

The Carrier argues that by expressly addressing seniority district transfers in one Rule—Rule 25—and defining the circumstances under which such transfers would be allowed, the parties implicitly excluded any others—invoking the principle of “inclusio unius est exclusio alterius,” or “to state one thing is to exclude another.” That principle, however, is most frequently applied where there are lists of multiple items, or where the one thing stated is incompatible with another interpretation. The language in Rule 25 clearly and specifically provides employees who would otherwise be furloughed with an opportunity to transfer to a different seniority district. But Rule 25 is not inconsistent with a broad interpretation of the general language used by the parties in Rule 41(H). Under Rule 41(H) and Rule 22, individuals who transfer from one seniority district to another lose their accrued seniority in their original district and start to accrue all over again when they begin to earn in the new district. Rule 25 differs from Rule 41(H) in that Rule 25 makes special provision for employees who have been furloughed to transfer temporarily to another district without losing seniority in their original district.<sup>3</sup> The parties have engaged in collective bargaining for years. If they had intended Rule 41(H)’s broad reference to “applicants for transfer from other seniority districts” to refer only to the narrow category of furloughed employees referenced in Rule 25, one would have expected language in the Agreement tying the two Rules together. But there is none.

It is also important to interpret language of a contract in context. Here, another section of Rule 41, Rule 41(D), states that “Bulletins advertising new positions or vacancies and assigning positions to the successful applicants will be furnished all employees entitled to consideration in filling the position, with copy to the General Chairman.” (Emphasis added.) Bulletins are posted on-line for any employee to see, and if the Carrier wanted to limit who could bid on a position, it could easily do so with a notation on the bulletin itself. There are no such notations on the bulletins for the positions that the Claimant applied for. Without any limitation on the bulletins that were

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<sup>3</sup> Rule 25 provides that furloughed employees retain their “home” seniority while they are working in another seniority district, but it also requires them to return to their home district when offered the opportunity to do so. If they refuse, they are treated like other transfers, and lose their original accrued seniority and start to accrue again in the new district.

posted, the Claimant could reasonably have assumed that he was an employee “entitled to consideration in filling the position” pursuant to Rule 41(D).

The record also includes a Carrier “Signal Seniority District Transfer Policy” on seniority district transfers. However, it was not issued until December 3, 2011, after the incident giving rise to this claim, which is one of several similar claims filed at about the same time. The Policy was promulgated in response to the claims and accordingly has limited relevance.

The record includes evidence suggesting that the Carrier became more hostile toward seniority district transfers after 2007, when it entered into a contracting agreement with the Organization that limited its right to furlough BRS-represented employees and required it to maintain a minimum number of BRS-represented employees, in exchange for an expanded right to contract out what would otherwise be considered signal employees’ work. But the master BNSF/BRS Agreement pre-dated the contracting agreement, and in the absence of any language in the contracting agreement that modifies the master Agreement, the terms of the latter are still in effect and control the interpretation of cases like this one.

The language of Rule 41(H) is clear and straightforward in establishing a hierarchy of preferences for how bids are to be considered and awarded, which proceeds in ever-widening groups: employees within the seniority district where the bulletined position is located must be considered first, employees in other seniority districts second, and finally, anyone the Carrier deems suitable, including new hires from outside. Against that background, as a qualified employee in a different seniority district, under Rule 41(H) the Claimant should have been awarded one of the Kansas Seniority District positions on which he bid, and the Carrier violated the Agreement when it failed to do so.

By way of remedy, the Organization seeks monetary compensation pursuant to Article 41(G). Such an award would be inappropriate in this case, however, as Article 41(G) is, in effect, a penalty clause for when the Carrier fails to place a successful bidder in his new position within specified time limits. This case presents a good faith dispute between the parties about whether the Claimant was entitled to be assigned to the position in the first place, and it would be unfair to penalize the Carrier for pursuing the dispute through the grievance process to the end. The Organization also seeks seniority for the Claimant on the Kansas Seniority District dating back to October 31, 2011, when the original assignments for the bid sheet were posted. Rule 22 provides that seniority “begins at the time an employee’s pay starts in the seniority class and district in which employed.” The record is not clear when the Claimant would actually have started



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**working. Accordingly, he is entitled only to seniority in accordance with the applicable rules of the collective bargaining agreement.**

**AWARD**

**Claim sustained in accordance with the findings.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 19th day of April 2017.**