

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY**

DISPUTE.—

"(a) That E. W. Muse shall be assigned to the position of Assistant Signal Maintainer at Wampum, as advertised in bulletin under date of April 4, 1935.

"(b) That E. W. Muse shall be paid the difference between what he would have earned as an Assistant Signalman or Assistant Signal Maintainer had he been assigned to such positions at Wampum subsequent to March 30, 1935, and the amount he has actually received since March 30, 1935."

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

The Carrier and the Employee 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.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Willard E. Hotchkiss was called in as Referee to sit with the Division as a member thereof.

The parties have certified the following "Joint Statement of Facts":

"Immediately prior to the March 30, 1935, force reduction, Muse was employed as an Assistant Signal Maintainer at Monessen, and upon being displaced, he indicated his desire to displace Jeff Adams, a junior man as Assistant Signalman at Wampum, which was denied.

"Under advertisement dated April 4, 1935, Muse bid for job as Assistant Signal Maintainer at Wampum, which bid was rejected and the job awarded to Jeff Adams, a junior man."

There is in evidence an agreement between the parties bearing effective date of August 16, 1923.

POSITION OF PETITIONERS.—In their brief the Petitioners cite the following rules as supporting their claim:

RULE 3

"Assistant Signalman, Assistant Signal Maintainer. A man in training for the position of signalman or signal maintainer and under the direction of the signalman or signal maintainer, performing the work generally recognized as signal work, shall be classified as assistant signalman or assistant signal maintainer.

"The number of assistant signalmen and assistant signal maintainers on a seniority district shall be consistent with the requirements of the service and the signal apparatus to be installed or maintained.

"The men assigned to these positions should be promoted from helpers. Ability being sufficient, seniority will govern. They will be continued in such positions for a period of four years.

"(a) A man failing to show sufficient aptitude within a period of three months, to learn the work, will be returned to the position of helper, retaining his seniority rights as such.

"(b) A man may be promoted to the position of signalman or signal maintainer if a position to which he is entitled is open and he has qualified in less than four years to perform the work. If a man so promoted fails to meet the requirements of the position, he will be restored to the position of assistant signalman or assistant signal maintainer to which he is entitled.

"At the expiration of four years' service as assistant signalman or assistant signal maintainer he will be offered promotion if a position to which he is entitled is open. He may, if no position is open, continue as assistant signalman or assistant signal maintainer until it is possible to promote him to a position to which he is entitled."

RULE 36. b, c, d, revised June 1, 1925

"(b) Employees entering the service in any of the classes above that of helper shall carry seniority in the lower classes from the date of entering service. Assistant Signalmen and Assistant Signal Maintainers shall, upon completion of four years' apprenticeship, be placed on the roster and hold seniority as the youngest signalman and signal maintainer subject to provision in paragraph b, Rule 3.

"(c) When force is reduced the senior man in a class on the seniority district, capable of doing the work shall be retained.

"(d) When force is reduced or position abolished an employee thereby displaced will have the right within ten days to displace an employee with less seniority rights in any class in which he holds seniority rights."

RULE 29

"Promotion Basis: Promotions to positions coming within the scope of this agreement shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail; the management to be the judge."

RULE 30

"Transfers. In transferring employees to fill vacancies or new positions, the provisions of Rule 29 will apply."

In arguing their claim the Petitioners submit that Mr. Muse was advised by the chief clerk that before he could be awarded the position in question, he must first qualify and was instructed to report to the Signal Engineer on April 1st, 1935. They say that Muse objected to being required to qualify "on the grounds that he was a man in training and incidentally, his record as a maintainer even surpassed any qualifications as an assistant."

The Petitioner's brief reports further developments of the case substantially as follows: Muse reported to the Signal Engineer April 1st, 1935, as ordered. The two were in conference from 8:30 to 9:30 A. M. In this conference Muse was advised that the Management had the right to make him qualify under Rule 29. Muse objected and maintained the position he had taken with the Chief Clerk. The Signal Engineer instructed Muse to report to Mr. Fisher for examination. Muse protested but nevertheless complied. Fisher turned him over to Mr. Roney. Roney "told Muse that his instructions from the Signal Engineer were to examine him" (Muse), "as to the location of the houses, housing the apparatus in connection with the C. T. C. installation, also the name and number of units in the housings."

Quoting further from Petitioner's brief, "Between the dates of April 1st and April 6, he" (Muse), "had received no notification that he had been disqualified and only received that information on his personal appearance at the office of the Signal Engineer on April 6. He was again informed that he had been disqualified under the provisions of Rule 29."

Still quoting Petitioners' brief, "The four positions as shown in Exhibit 'B' were abolished and a bulletin issued on April 4, 1935, advertising the position of one maintainer and one assistant with headquarters at Wampum. The maintainer receiving the position had to be qualified to maintain C. T. C. inter-

locking plant and his assistant had to be qualified on signal circuits. It should be noted that the Maintainer is required to live within calling distance of his headquarters. Locations not at headquarters must be approved by Signal Supervisor. On April 24, 1935, Muse was given a preliminary examination on interlocking circuits in general. As a result of the examination, the management states that Muse showed a decided lack of knowledge as far as interlocking circuits were concerned."

Continuing, the Petitioners maintain that every interlocking plant has certain local peculiarities which would make it impossible for an employee with good general qualifications to read blueprints of it readily if he had not been in contact with it for some time. The brief further expresses doubt whether a Signal Engineer, Supervisor, or other official can read such blueprints without concentration or study.

In short, the contention on this point is that with adequate opportunity for time and study, Muse could have shown himself equally competent with any other employee and that Muse unquestionably had sufficient ability and merit for the position in question. From this they say it follows that the failure to recognize his seniority was a violation of the rule.

The brief further maintains that an assistant is a man in training, "and it is manifestly a violation of the rules to establish requirements in connection with such positions that mean that the successful applicant must be fully qualified to perform the work of a signalman and signal maintainer."

The brief then points out that after being denied the position at Wampum, Muse did work on nine other assignments for various periods of time of a nature to establish his competency. The remainder of the brief has to do with the following aspects of the case:

(1) Questions concerning Woolslayer, an employee whom the carrier says is the senior of Muse, but whose case is not now before the Board.

(2) Contention that a letter written by Signal Engineer I. S. Raymer to General Chairman Doble on May 15th, 1935, shows that the reason for disqualifying Muse was his unfamiliarity with the location of the apparatus to be tested.

(3) Contention that Mr. Raymer's letter of June 11th, 1935, urging that Muse was not qualified to perform certain duties at night when the maintainer was out of reach, indicates that the management needed two signal maintainers to meet their requirements.

(4) Contention that Rule 3 is absolutely specific and leaves no room for interpretation, and that the position of the carrier means he is asking for the work of a maintainer with the pay of an assistant.

(5) Review of Muse's record with the carrier consisting of five years and six months as assistant after which he was promoted to position of signalman in May 1923, since which date it is claimed he has filled that position almost continuously, and performed exacting duties which demonstrate his competence.

(6) Exceptions taken to the examination given Muse as unauthorized in a case where a signalman is displacing an assistant.

(7) Contention that the circumstance of Muse failing to bid on the position when the C. T. C. was under construction is not material.

POSITION OF THE CARRIER.—The first three paragraphs of the Carrier's brief are as follows:

"When Assistant Signal Maintainer E. W. Muse was displaced at Moneesen on March 30, 1935, he indicated that he wanted to displace Jeff Adams, who was then working temporarily as an assistant, testing the newly completed C. T. C. plant at Wampum. At this time the men who constructed the plant were laid off and the men who were working on this plant, both signalmen and assistant signalmen, were checking and testing the working and operation of the interlocking. As Muse was not considered qualified on the interlocking work in question, he was not permitted to displace Adams. Adams, who was retained for checking and testing purposes, had actually worked on the construction gang, building the plant, and had exhibited his qualifications. By reason of lack of qualifications, Muse would have been a hindrance rather than a help while testing the plant; therefore, he was disqualified under the provisions of Rules 29 and 30, which are quoted further on in our position.

"On April 4, 1935, advertisements were posted for job as assistant signal maintainer on centralized traffic control in interlocking plant, Wampum,

Penna. In the order of their standing on the seniority roster, the following assistant signal maintainers submitted bids for the job: Messrs. C. I. Wool-slayer, E. W. Muse, Jeff Adams, and A. M. Izenour.

"This was the first advertisement for permanent positions at this plant and included maintainer as well as assistant maintainer, the installation of this plant having just been completed and turned over for operation. There are no other interlocking plants of the same kind on this property, and all applicants for these positions either as maintainers or assistant maintainers were required to take an examination to qualify for the jobs, and after examination, assistant maintainer Jeff Adams, third in the order of seniority of the applicants, qualified and was assigned to the job."

Continuing, the carrier denies that there was any violation of Rules in passing over Muse and giving the position to Adams. The carrier cites the language of Rule 36 (c)—That "When force is reduced the senior man in a class on the seniority district, *capable of doing the work*, shall be retained." (Italic as in brief.)

The brief then continues: "At the time Muse was displaced in the reduction in force, it was not considered that he was capable of doing the work of the position of assistant signalman at Wampum, held by Adams, and, consequently, Adams was retained, he being considered the senior man capable of doing the work as provided in Rule 36 (c)."

The Carrier's brief then discussed Rules 29 and 30. Rule 29 covers promotion basis, in the language as quoted in the Petitioner's brief, and Rule 30 covers transfers, language also as quoted in the Petitioner's brief. The Carrier's brief then submits that "in the judgment of the Management, Muse did not have sufficient ability and merit to fill the position of assistant signalman at Wampum, consequently, the rule sustains the action of the Management in assigning the position to Adams."

Referring to the contention of the Petitioners that an assistant maintainer being merely a man in training for position of signalman or signal maintainer is not required to qualify, the brief cites paragraph (b) of Rule 36, as subjected to Paragraph (b) of Rule 3, and concludes "that Muse was not an employee in training but had completed his apprenticeship and should have been familiar with all of the work generally recognized as signal work."

The Carrier's brief then maintains that all of the rules referred to applied to assistant maintainers and they cite the preamble of the Agreement, to-wit:

"Score.—These rules shall apply to employees classified in Rules 1, 2, 3, 4, and 5, performing the work generally recognized as signal work."

The Carrier then sets forth at length that the conditions of traffic at Wampum, the fact that Mr. Adams remained with the installing gangs until the installations were completed, his knowledge and familiarity with interlocking plants, the fact that Mr. Muse did not vote to work with this gang, choosing to remain on other positions, and that he had spent most of his time on other divisions of the road, where there were no electric interlocking plants, and therefore, did not take advantage of his opportunities to learn about the maintenance of electric interlocking, justified the assignment of Adams to the position.

The brief further cites that the Signal Supervisor was instructed to choose the senior qualified applicant and that the first two men on the list, of which Muse was second, were disqualified. The brief cites also that the applicants were not questioned on the complicated circuits of the C. T. C. System, but an effort was made to select a man who had knowledge of interlockings in general.

The brief stresses the fact that the installation was entirely new and the applicants were given the privilege of choosing the interlocking plant with which they were most familiar, and were provided with the circuits of the plant which they selected and asked to explain the controlling circuits of approach locking, signal controls, etc. The brief further states that the first and second applicants, of which Muse was second, showed decided lack of knowledge of the circuits, whereas Mr. Adams "not only showed that he had understanding of and familiarity with these circuits, but also showed that he had a basic understanding of electric interlockings in general, which was lacking in the other two men, and, consequently, Mr. Adams was assigned to the position."

The Carrier's brief advances certain amendments to petitioner's data as to Mr. Muse's service record, subsequent to his disqualification and observes that

"had he been as energetic in the years before as he has been in the past year, he might have qualified for the job at Wampum." Quoting further from Carrier's brief, "At no time during that twelve years has he maintained or assisted in maintaining an all-electric interlocking plant, and the facts are that the service performed by Muse was such that would afford him little, if any, experience on electric interlocking maintenance or blueprint circuit work."

In conclusion, the Carrier's brief reiterates its original contentions in respect to the operation of Rules 29 and 30, and emphasizes the provision that Management is to be the judge.

PETITIONER'S ADDITIONAL STATEMENT.—The additional statement of the Petitioner reiterates its original position and maintains that Muse unquestionably had the right to displace an employee with less seniority under Rule 36 (d), which reads:

"When force is reduced or position abolished, an employee thereby displaced will have the right within ten days to displace an employee with less seniority rights in any class in which he holds seniority rights."

The brief further emphasizes the contention that an assistant signalman or assistant signal maintainer cannot be expected to do all the work required of a signalman or signal maintainer or possess all of the qualifications.

The brief further contends that the notice distributed to the employees concerning the position in question "will very clearly show that this bulletin was issued with the intention of excluding all employees who would be likely to make application with the one exception of the man who was subsequently assigned to the position. * * * "Nor can there be any question but what the improper requirements set forth in the notice were used as a guide when Muse was refused assignment to the position."

Certain other exceptions are taken to the notice of this vacancy, and the objection is made that "It is strange that it took the railway management twelve years—from 1923 to 1935—to discover that Muse was lacking in ability."

SUPPLEMENTAL STATEMENT OF CARRIER.—In this statement the Carrier further analyzes Muse's service record and reiterates that Muse had no service as a Maintainer or assistant maintainer on an all-electric interlocking plant.

The statement also emphasized the special requirements in assigning a man to the position of assistant signal maintainer arising out of the fact "that the C. T. C. plant at Wampum is an entirely new facility on this property, there being no other interlocking plants of the same kind on this railroad." This circumstance is advanced to refute the contention of the petitioner concerning the impropriety of the examination procedure adopted.

Essentially, the position of the carrier is summed up in the following language:

"Under Rule 29, which rule is applicable to Assistant Signalmen and Assistant Signal Maintainers along with other classes of Signal Department employees, the Management has the right to be the judge of whether or not 'ability and merit' are sufficient. The language 'the management to be the judge' is clear and needs no interpretation. In the case of Mr. Muse, the Management did not consider his ability and merit to be sufficient because, upon examination, he was found to be unfamiliar with electric interlocking circuits. The fact that we had not heretofore questioned this man's qualifications cannot be construed as evidence of his qualification for work on which up to that time he had had little, if any, experience. As a matter of fact, from Employee's Exhibit 'C', it will be noted that—'At a later examination he showed that he did not clearly understand circuits of an interlocking plant where he had worked and of which he was most familiar.' Manifestly, if he did not understand the circuits of a plant at which he had worked and with which he was most familiar, the Management was not wrong in its judgment that he was not sufficiently qualified for the position in the new plant at Wampum."

The statement concludes with two paragraphs, one pointing out that Muse had not lost any seniority rights but had the same position on the seniority roster as he had before, and another urging the fact that Muse's seniority rights are inferior to those of Woolslayer, also disqualified. This was in reiteration of a position taken originally but not emphasized in the above summary.

CONSIDERATION OF CASE BEFORE REFEREE.—Discussion of the respective claims of the petitioner and the carrier before the Referee threw some new light upon the issues, but was chiefly significant in respect to the emphasis which it directed to particular points.

There was considerable argument in reference to the relative importance of different clauses in the agreement as to their applications to this case. The practice under the agreement by which a signalman or signal maintainer is utilized on occasions as assistant signalmen or signal maintainer is confusing in its relation to the definition of an assistant as a man in training, and both sides have advanced some arguments based, as it appears to the Referee, upon this technical inconsistency. These arguments were not particularly stressed in the above outline because the referee does not consider them controlling.

ARGUMENTS FOR THE PETITIONER.—In behalf of the petitioner it was urged that the carrier's action in depriving Muse of employment rights while a junior man was continued at work completely disregarded the provisions of the agreement which permit a senior to displace a junior as seniority rights under the rules. The fact that Muse had for years performed the duties of a higher-rated position and was a mechanic demonstrates, it was held, his qualifications for a lower-rated position. The analogy was advanced of an examination of an engineer to establish his ability as a fireman.

It was further urged that the action of the carrier in this case, if upheld, would be destructive of all seniority rights under the agreement. Particular attention was given to the fact that Rule 29 has to do with promotion, whereas the case in question involves a demotion.

Emphasis was also laid on the contention that the carrier was attempting to secure two mechanics instead of one mechanic and one assistant, and the bulletins are cited in evidence.

It was urged that the injection of Woolslayer by the carrier is entirely irrelevant, since his case is not in court and he was apparently satisfied with his disqualification. In this connection it was strongly urged that the right of the management to deny senior employees their displacement rights cannot be carried into the agreement without adding thereto an exception which does not appear in the rules, and cannot be read into them without doing violence to the language. To inject such qualification and condition, it was urged, would be not to interpret but to amend, an action not permitted under the law. In support of this position, citation was made of the decision of Referee Garrison in Award No. 255, to-wit:

"It is an elementary principle of contract law that a written contract embodies all the understandings between the parties."

And again:

"To inject qualifications and conditions of this sort into the agreement" (referring to an issue under the agreement between the O. R. T. and the Santa Fe Railway) "would be not to interpret but to amend it."

And later, in the same decision:

"It could not be carried into the agreement without adding thereto an exception which does not appear in it and which cannot be read into it without doing violence to its language."

Other citations were made from an interpretation of Rule 14, C. B. & Q. Yardmen's Agreement, effective March 1, 1927, Robert C. Corwin, Referee:

"The fundamental objective of organized labor in its bargaining for work has been to assure stability of employment with a preference to those senior in service."

And later on:

"In interpreting the rule, of course, we cannot write a new one. It is there, and we can't escape it. It does seem legitimate, however, to restrict it to such situations as the parties must have contemplated it should cover."

ARGUMENT FOR CARRIER.—Replying to the claim that Muse' lack of knowledge of interlocking circuits pertained only to the immediate plant, it

was urged that the purpose was to secure a man with knowledge of interlocking circuits in general.

Concerning the contention that the management wanted a mechanic at an assistant's rate, it was admitted that the bulletin should have read "to assist the maintainer in charge of section", but it was held that it made no difference in the character of the examination.

The point was stressed that the record of Muse as extended by the carrier shows that during the twelve years prior to April 1935 he neither maintained nor assisted in maintaining all-electric interlocking plants.

The propriety of the examination method to determine qualifications is emphasized, and it is urged that the definition of an assistant as a man in training cannot apply in the case of a mechanic who has completed his training. The relative claims of Woolslayer, the senior of Muse, were also stressed.

OPINION OF THE REFEREE.—Both parties to this dispute have pointed to the importance of the case. The Referee recognizes its peculiar significance and has, therefore, studied the record and the agreement under which the case is brought with great care.

The Referee recognizes the principles contained in the citations from Referee Garrison, and from an interpretation of Rule 14, C. B. & Q. Yardman's Agreement by Referee Corwin. These citations are properly advanced as a caution to the referee, but he does not consider them directly relevant, because he does not believe that it is necessary to add to or take from the language of the agreement, or to distort its meaning, in the process of deciding this case.

The first question before the referee is whether the agreement, by a fair interpretation and without distortion or doing violence to the language, covers the points at issue. The Referee believes that the issues are so covered.

In applying the agreement to the case, we are met with two opposing assumptions, both of which at first blush appear to be based on common sense but which have to be reconciled or one of them overruled. The first assumption is that it is unreasonable to assume that a man who has qualified for a higher-rated position is not qualified for a lower-rated position in the same line. The second assumption is that in making the provision of Rule 29 "ability and merit being sufficient, seniority shall prevail; management to be the judge", apply to transfers (Rule 30), the obvious purpose was so to qualify the application of seniority rights that management would always be in a position to secure a person actually qualified for positions which might have to be filled.

It does not seem probable that in the typical case these two reasonable assumptions would be in conflict. It is proper to assume that when the agreement was made no cases were in the minds of the parties in which the two assumptions would be in conflict, and yet the agreement was made with the obvious intent of covering the relations between the parties so that the work to be performed under it could be done and issues which might arise could be met and settled. It is reasonable to expect that some unforeseen problems will arise under any such agreement, and it is competent so to interpret the agreement as to cover such cases, if it can be done without doing violence to the language or proceeding in a manner which the agreement forbids.

Study of the record and consideration of all the circumstances convince the Referee that in this case the reasonable assumption that, ordinarily, a mechanic should be able to perform the work of an employe who is less than mechanic in the same line, and the equally reasonable assumption that the management is entitled under the agreement to secure a qualified employe, cannot be reconciled, and the question becomes which assumption has the greater merit in all the circumstances.

In this connection the Referee considered the following circumstances as pertinent and governing. The case has to do with an art which has undergone technical change during the period of Mr. Muse' service. It is unavoidable that qualification to perform at least some of the duties of a mechanic, or even of an assistant, should undergo similar change and necessitate diligence on the part of employes in order to maintain their qualifications for new positions in their respective crafts. While Mr. Muse appears to have been an acceptable employe, the record shows that he had not kept himself fully abreast of new developments in signaling.

The further fact that the work in question has to do with a new and expensive installation, the first of its kind on the property, justifies the management's

requirement that any employee assigned to work on it should be fully competent. The management has not only the responsibility of safeguarding the investment of the owners of the property, but it has the still more compelling responsibility to safeguard the public interest, especially in a line of work in which the safety of the public is so clearly involved as it is in signaling.

Accepting, as the Referee does, the application of Rule 30 with the language carried over from Rule 29, to-wit: "Ability and merit being sufficient; management to be the judge"; the Referee holds that it is competent for the management under the agreement to adopt any reasonable and orderly procedure, suitable examination included, to ascertain ability and merit.

Some question has been raised about the character of the examinations held, but the Referee does not find evidence that it was unduly severe or unreasonable.

It is apparent that the position in the first instance was not suitably bulletined, and this has given rise to the question whether the work of the position is not the work of a mechanic instead of an assistant. If that question had been made the issue in this case, the Referee would require more evidence upon the point than the record contains before he could reach a decision. The Referee holds that the question of the true rating of the position is not the issue in this case, but under the agreement it could be made an issue in a subsequent case, if the petitioner should present evidence to justify such action. Hence, no rights under the agreement need be invaded by the findings of the Referee on the issues of the case now being decided.

As to the status of Mr. Muse as a result of his disqualification, his seniority rights are intact, and it is always competent for him to displace a junior employee under the rules for any position for which he can qualify. He is not even estopped from trying to prepare himself for a position for which he was once disqualified however proper may have been the disqualification at the time it occurred.

A final word is in order as to the effect of this decision on seniority rights under the Agreement. Properly interpreted, it cannot be held in any sense to break down such rights. It will, of course, be the task of those who have to deal with subsequent cases to apply the terms of the Agreement, but it is inconceivable that any Board or Referee before upholding any disqualifications, will not require evidence of sound reasons, good faith, and proper procedure in disqualifying any employee for a position for which he enjoys seniority rights.

AWARD

Claim denied.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 13th day of July 1936.