

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

St. Clair Smith, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
THE TEXAS AND PACIFIC RAILWAY COMPANY**

STATEMENT OF CLAIM: That T. A. Wynne was improperly removed from position of signal maintainer for The Texas and Pacific Railway Company, with headquarters located at Jefferson, Texas, and that he be paid at the established rate of \$231.15 per month for time lost from date so removed (October 2, 1942) until date of assignment to signal maintainer's position (October 16, 1942) with headquarters located at Colorado, Texas, both dates inclusive, making a total of fifteen days' time involved in claim.

EMPLOYEES' STATEMENT OF FACTS: Under date of August 19, 1942, and in accordance with the provisions of the then existing agreement dated January 1, 1930, between The Texas and Pacific Railway Company and its employees represented by the Brotherhood of Railroad Signalmen of America, T. A. Wynne, a qualified signalman, signal maintainer and construction foreman with over twenty-three years' experience as such, fourteen years of which were as signalman and signal maintainer for this carrier, was assigned to the position of signal maintainer with headquarters located at Jefferson, Texas. On or about August 26, 1942 Mr. Wynne was transferred to said assignment, at which time he assumed the regular duties and responsibilities in connection therewith.

Mr. Wynne remained on this assignment for a total period of thirty-six days, or from August 26, 1942, the date transferred to the assignment, until 12:01 A. M., October 2, 1942, the date upon which he was relieved of the duties and responsibility of said assignment.

Under date of September 26, 1942, Signal Supervisor E. B. Jones subjected Mr. Wynne to a written examination for the purpose, as he contended, of determining whether he (Wynne) was competent to perform the duties and assume the responsibilities of the position to which assigned.

Under date of October 1, 1942, Mr. Wynne was advised by letter over the signature of Signal Supervisor E. B. Jones that he (Wynne) had failed to pass a satisfactory examination and that he would be relieved of that assignment as of 12:01 A. M., October 2, 1942, with further advice that he (Wynne) could exercise his seniority rights by placing himself by bid or reporting to signal gang.

Mr. Wynne advised the Signal Supervisor that he would report to signal gang as directed. He then pointed out rules of the agreement that would be involved and compensation expected. The Signal Supervisor did not reply to Mr. Wynne's letter nor did he instruct Mr. Wynne where to report. Mr. Wynne was out of service from October 1 until he bid for and was assigned to position of signal maintainer at Colorado, Texas, October 16, 1942.

During the period Mr. Wynne was assigned to the position of signal maintainer at Jefferson, he performed all duties in connection therewith without the necessity of calling upon his supervisor or others for assistance in handling the work.

From October 1 until October 16, 1942 the position of signal maintainer at Jefferson was filled by an employe without seniority rights in that class.

This, the representative declined, as per letter of November 5, 1942, Exhibit "B," replied to by Assistant Vice President James' letter of December 14th, 1942, shown as Exhibit "C."

Would also call the attention of the Board to previous awards 52, 96, 324, 396, 592, 1009, 1147, 1171, 1441 and 2031, denying similar principle herein involved.

Award 2058 further supports the Carrier's position here and in that the 1929 Agreement mentioned therein is the same as Article 10 (a), here and in Opinion of Board, states:

"In interpreting similar rules to the rule in the 1929 agreement, this Board has held that in the first instance the Carrier must be the judge of the ability of an employe to fill a position, but a Carrier must be free from fraud, caprice, and unreasonableness in making its decision as to an employe's ability.

"Under the 1939 agreement, we find the rule very similar to the 1929 agreement, with the following addition in reference to ability: '(to be determined by the Management, by examination if deemed necessary by it, or if requested by the employe).'

"By the addition of these clauses, the 1929 agreement was changed. It still gives to the Carrier in the first instance the right to determine the ability of an employe, and if the Carrier has any doubt as to his ability, it may give him an examination to determine that question. But these clauses also give the employe an added right, which is that if the employe thinks he has not been fairly dealt with by the Carrier, he has a right to an examination to prove his ability. This is true, if the employe requests the examination. Of course, the employe is entitled to a fair and reasonable examination by the Carrier; a fraudulent examination would be equivalent to no examination. It would be the same as if the Carrier refused to accord the employe an examination after a proper request for same.

"The record shows that the claimant did not request an examination. The Board thinks that such a request is a condition precedent to sustaining the claimant's position. Having failed to request the examination, the Carrier did not violate the current agreement.

FINDINGS: That there was no violation of the agreement.

AWARD

Claim denied."

The Carrier has conclusively shown that the claimant was not improperly removed from position at Jefferson; no schedule rule violated, none cited by the representatives, and no basis for compensation claimed.

OPINION OF BOARD: This submission requires us to determine whether the carrier's representatives were actuated by improper motives in estimating the ability and merit of T. A. Wynne, the senior and successful bidder, for the position of signal maintainer at Jefferson, Texas.

The pertinent rule among other things provides:

"Promotions or transfers shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail; the Management to be the judge." (Rule 10-a)

The principles upon which our decision must rest are settled. They were clearly phrased in Award 96 as follows:

"Under the rules and in the first instance, the carrier has the responsibility of determining the fitness and ability of the employes, and this Division should be reluctant to interfere with the decision so made by the carrier so long as it acts in good faith, is without bias or prejudice and indicates no disposition to purposely or carelessly evade or disrespect the rules as well as the spirit and intention thereof."

That the procedure followed by the carrier was such as should have afforded claimant a full and fair opportunity, not only to qualify, but to demonstrate his qualifications for the coveted position cannot be questioned. He was placed on the position, furnished with materials for study, offered assistance and instruction, and after a period of thirty days, subjected to examination. If he was wronged it is because his qualifications were not impartially judged and because all of this outward show of fairness was but a false pretense masking a design to deny him that which was rightfully his as the senior bidder.

The issue is one of fact and deals with the motives of the carrier's representatives, Supervisor Jones, and Engineer Weatherby. To review the record in detail would unduly extend this opinion. Suffice it to say that a process of studious examination of all of its parts, and a most careful consideration of all of the suspicious circumstances to which the employes point as badges of bad faith, have failed to induce an abiding conviction that the carrier was actuated by improper motives. We therefore find that after a reasonable investigation and test the carrier in good faith concluded that claimant lacked the qualifications essential to public safety in the premises.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim is denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of February, 1944.