

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated agreement in effect by declining to assign Obie H. Matheny, Monongah Division, who holds seniority rights as section foreman, to position of section foreman when vacancies for position of section foreman are bulletined;

(2) That Obie H. Matheny who filed his bid on Bulletin No. 64 for the position of section foreman at Lumberport, West Virginia, should have been assigned to that position instead of junior Foreman A. E. Bennett;

(3) That Obie H. Matheny shall now be assigned to the position of section foreman at Lumberport, West Virginia, and paid the difference between what he has received working as section laborer and that which he should have received as section foreman at Lumberport, retroactive to the date A. E. Bennett was assigned to that position.

EMPLOYEES STATEMENT OF FACTS: The claimant, Obie H. Matheny, was born August 1, 1903. At the age of seven he suffered the loss of one leg which was amputated some four or five inches below the knee and he has since worn an artificial limb. He was employed as a trackman on the Baltimore & Ohio Railroad on September 1, 1918; promoted to the rank of section foreman May 1, 1927; and holds seniority rights as a section foreman on the Monongah Division from that date.

In 1932 when a number of section foreman positions were abolished, Matheny was unable to hold a position of section foreman but was obliged to exercise his seniority rights as a trackman. He has since worked as a trackman on the Monogah Division. In recent years Matheny has sought assignment as section foreman by bidding on bulletins advertising positions of section foreman on various sections on the Monongah Division. The latest bulletin, advertising position for which Matheny submitted his bid, was Bulletin No. 64, issued October 9, 1945, advertising position of section foreman, Section 50, with headquarters at Lumberport, West Virginia. In each instance when Matheny bid for position of section foreman on bulletin issued his application was denied.

Agreement effective April 17, 1930, between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

the road; observe carefully all signals in passing; watch the telegraph line and keep the poles and wires in proper position; report promptly any derangement of the wires and assist the linemen when necessary; see that water stations are kept in order and report any failure in the water supply; see that the fences are kept in repair; prevent encroachment on the right-of-way and other grounds of the Company; render prompt assistance in case of accident, or delay to trains, and see that old material is gathered up, and that his section is kept in neat and proper condition."

TRACK INSPECTION

"541. The track foreman shall, once each week, make a careful personal inspection of all tracks, frogs, switches, switch stands and guard rails; also, his entire section and everything pertaining to it, and will take necessary action to have prompt repairs made to everything which the condition justifies."

It will be noted under Section (b) of Rule 150, above quoted, a section foreman has charge of the repairs on his section and is responsible for the safety of track, etc. In the inspection of bridges it is necessary for a track foreman to go up and down steep banks to inspect bridge seats and culverts. Section (f) provides that a track foreman must watch points where obstructions are likely to occur; examine the slopes of cuts, and remove anything liable to fall or slide; inspect and report defects in tunnel sidewalls, roof arches and portals. To perform the duties required in this section of Rule 150 a track foreman is obliged to climb steep banks and inspect them to see if there are loose rocks, dirt, etc. that is liable to slide on to the track.

We maintain that a person with but one limb cannot properly perform the duties required in sections (b) and (f) of Rule 150 and Rule 541 of the above quoted rules of Instructions Governing the Maintenance of Way Department.

Under the existing instructions it is also necessary for a section foreman to patrol his entire section, especially when forces are reduced, and check track conditions on the days trackmen are not working. This service could not be performed by a foreman in Mr. Matheny's physical condition.

We do not have a single section foreman on the entire system who has an artificial limb and Mr. Matheny has not worked in that capacity since July 1932, after this fact came to the attention of the management, or for over a period of 14 years.

There is attached as Carrier's Exhibit "B" an affidavit from Mr. C. B. Harveson, Chief Engineer Maintenance of the Baltimore and Ohio Railroad Company, outlining in detail the reasons, in his opinion, why Mr. Matheny was and is not qualified to work as a section foreman where he has seniority as such.

Exhibits not reproduced.

OPINION OF BOARD: This claim involves the question of whether or not the Carrier violated the agreement when it failed to assign Obie H. Matheny to the position of section foreman at Lumberport, West Virginia. Carrier assigned thereto A. E. Bennett, who was junior in seniority to Matheny.

Matheny first commenced to work with the Carrier in 1918. At that time he had an artificial limb due to an accident when he was seven years of age. He continued to work as trackman until May 1, 1927. He then became acting track foreman and worked in that position until November of 1930. Then he became track foreman and worked in that position until July 21, 1932. Due to reduction in forces he then returned to the position of trackman at which position he has been working ever since.

On October 12, 1945 Matheny bid for the position of track foreman on Section 50 of the Monongah Division of the Carrier with headquarters at Lumberport, West Virginia. Section 50 is about thirty seven and one-

half miles from Mannington Section, on which section Matheny has been working during all the time has been with the Carrier and which section is on the same division.

On November 19, 1945 A. E. Bennett, with a seniority date of March 5, 1936, was assigned to the position of Track Foremen on Section 50.

The Carrier gives as its reason for failing to assign the senior bidder to the position the fact that this physical condition, that is his artificial limb, causes him to lack the necessary qualifications to fulfill the duties of the position for which he bid. It should here be stated that Carrier's contention that it did not know of this condition at the time claimant was acting track foreman and track foreman during the years of 1927 to 1932 cannot be sustained from the record. Claimant started working for the Carrier in 1918 and has worked there for the Carrier ever since, including the years from 1918 and through 1932. That it must have known of claimant's condition of which it now complains is beyond question.

Under the Rules of the parties' agreement it is required that the assignment shall be made to the senior qualified bidder. Under these rules the determination of the applicant's qualifications is primarily the responsibility of the Carrier. We cannot substitute our judgment for that of the Carrier in matters of this nature. Our function is to review the Carrier's decision to ascertain whether it was made in good faith and upon sufficient supporting evidence or whether it was the result of an abuse of its discretion.

The presumption of claimant's qualifications that arise by reason of his previous years of service, both as an acting track foreman and as a track foreman, are not necessarily conclusive but they do relate primarily to the type of operations of which he has been in charge. From the affidavit of C. B. Harveson, Chief Engineer of Maintenance for the Carrier, it is apparent that claimant had been acting track foreman and track foreman under similar conditions as on the positions here involved, as his affidavit covers the entire Monongah Division of which the Manning section is a part.

From the record it appears that the duties that would be required to be performed by the track foreman on Section 50 would be no different than those on the Mannington section. Since the record of claimant as a track foreman on the Mannington section seems to have been satisfactory we think, from the record before us, that the Carrier abused its discretion in failing to assign claimant thereto.

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

That the Carrier and the Employees involved this dispute are respectively carrier and employees 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 Carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of November.