

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**Third Division**

**Lloyd K. Garrison, Referee**

**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS  
LOS ANGELES AND SALT LAKE RAILROAD COMPANY**

**DISPUTE.—**

"Claim of Telegrapher J. E. Swindler to right to Position of Third Trick Telegrapher, Caliente, Nevada, and Pay for Time Lost as a result of Having Been Denied this Right."

**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, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

An agreement is in effect between the parties bearing date of March 1, 1928.

Mr. J. E. Swindler entered the employ of the Carrier on April 18, 1918, serving as Telegrapher at Provo, Utah, until October 17, 1931, when the position was abolished. He was then assigned to the position of Second Trick Telegrapher at Caliente, Nevada, a terminal, on November 2, 1931, and remained on that position until November 1, 1933, when he was discharged for violation of Rule 222 (a)—(Failure to sign transfer). He was reinstated December 9, 1933, and permitted to exercise seniority and displace the youngest assigned telegrapher on the Third Trick Telegraph position at Caliente, Nevada. He requested and was given leave of absence, and on April 15, 1934, bid in and was assigned to the position of Second Trick Telegrapher at Tintic, Utah; thereupon he requested and was granted an extension of his leave of absence.

On June 9, 1934, he was examined by the Chief Surgeon at Salt Lake City. The Chief Surgeon had thought it desirable to make this examination upon the receipt shortly before of the report of a subordinate Surgeon. The Chief Surgeon reported to the General Manager that Swindler's right leg had been deformed since childhood; that it was approximately two inches shorter than its fellow; that he wore a specially made shoe, walked with a limp, used a cane, and "is not safe on or about live tracks or in the vicinity of moving machinery, etc."

After the Management's receipt of this report, the position at Tintic was declared vacant and placed on bulletin, and was bid in by the Third Trick Telegrapher at Caliente, which position was bulletined on June 16, 1934. Swindler applied for this position but an employee junior in seniority was assigned over his bid. In connection with this application, Swindler had also applied for the vacant position of First Trick Telegrapher at Lynndyl which was his first choice and to which his seniority also entitled him, but he did not contest his right to this position because, according to the employees, he would have had to call train crews, which admittedly he would have been handicapped in doing. About a year after Swindler was denied the right to the position of Third Trick Telegrapher at Caliente he was offered the position of First Trick Telegrapher at the same station, but declined to accept the position because

there was no assurance of its permanency, Swindler fearing that at any time the position might be discontinued and the work absorbed by the Agent. In fact, the position is still in effect at Caliente. The carrier was willing to have him fill it because there would have been other employees in the station during his hours of service so that it would not be necessary for him to go out of the station, whereas on the third trick, the position he wanted, he would be all alone in the station.

The sole question is whether Mr. Swindler's "ability and qualifications" were "sufficient" within the meaning of Rule 6 (a) of the Agreement to entitle him to the position of Third Trick Telegrapher at Caliente.

The employees' position is substantially as follows. Swindler's physical defect had existed since childhood and was apparent to everyone; there was nothing concealed about it. While during his service at Provo, which was a branch line freight station, his duties may not have required him to be on or about live tracks, he was permitted after leaving the position to serve as Second Trick Telegrapher at Caliente for two years and was thereafter permitted to bid in the Third Trick position at Caliente, and later the Second Trick position at Tintic, and although because of leaves of absence he did not work on either of these last two positions, the fact that he was permitted to bid them in after serving for two years as Second Trick Telegrapher at Caliente shows that his physical defect was not then regarded as significant. In the light of this history, it is contended that his ability and qualifications were sufficient to entitle him to the position here in question. It is further shown that the present incumbent of the position, who was given the job when Swindler was disqualified, has not in fact had to leave the station during working hours—a period of over a year and a half.

The Carrier's position is in substance as follows. Swindler entered the employ of the Carrier during the period of the World War when men were scarce, and some of them had to be taken with physical infirmities which, had it not been for the man shortage, might have made the Carrier hesitant to employ them. For the next 13 years Swindler served at the small branch line freight station at Provo where his duties did not require him to go out of the office to deliver train orders or perform any service that would cause him to cross live tracks. Admittedly the issue of his physical defect was not raised until over two years after he had left Provo and had served at Caliente, and the issue might not have been raised had it not been for the sharp warning from the Chief Surgeon. Upon receipt of that warning the Carrier had to act to protect both itself and Swindler.

The fact that the present Third Trick operator at Caliente has not had to leave the station during working hours for the past year and a half is not conclusive. The question is not what has happened since, but whether, at the time the position was awarded, the Carrier was in good faith in supposing that the duties of the position might require the incumbent from time to time to cross tracks in connection with the delivery of train orders, or otherwise. Since the incumbent was to be all alone in the station with no one else to assist him, it seems to us that the management was justified in fearing that he might from time to time have to leave the station and cross tracks. The fact that this has not yet happened is immaterial, except as it may reflect on the good faith of the management in making its decision. But there seems to be no evidence of bad faith in the record, and the fact that the first trick telegraph position was later offered to Swindler indicates that the Carrier was not motivated by any desire to exclude him from the service.

It seems to us that where the question of personal safety is involved, the Carrier is entitled to be abundantly precautionous, and that, even though it may have acquiesced for sometime in the filling of a particular position by the employe, when the Carrier is warned by a responsible medical officer that it is dangerous for the employe to be on or around live tracks, the Carrier is entitled to disqualify the employe from thereafter holding the same or a similar position where there is substantial reason to believe that the work might necessitate, from time to time, the crossing of live tracks. The employes are fearful that, if the claim in the present case is denied, the Carrier may be able, at will, to disqualify employes from particular positions merely by obtaining a statement from the doctor. If the question is one of good faith, and if a case involving bad faith, or clearly arbitrary action should arise, it can be dealt with on the merits.

Here neither the accuracy of the chief surgeon's report, nor his statement that Swindler ought not to fill a position which might require him to cross live tracks, is disputed. The claim merely rests upon the proposition that, since the present incumbent of the position in question has not had to cross live tracks for over a year and a half, Swindler should have been given the job. But in the absence of a showing of bad faith, we cannot hold that the Carrier was unjustified in fearing that, in the particular position, Swindler might have to be called upon to leave the office and cross tracks. The fact that the Carrier was willing to have Swindler fill the first telegrapher position and, presumably, was willing to have him serve in positions similar to that at Provo, indicates, in the absence of anything to the contrary, that there was no intention of depriving him of work which he could perform without risk of injury. The actual risk in this case may have been very small, but we do not think the Board would be justified in requiring the Carrier to undertake it when there are other positions which could be occupied without any risk at all.

#### AWARD

Claim denied.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 9th day of April 1936.