

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
FORT WORTH AND DENVER CITY RAILWAY COMPANY**

DISPUTE.—

"Complaint of F. C. Paul against his displacement from position of highway crossing watchman at Wichita Falls, Texas, April 26, 1935. Request for restoration to him of his former regular assignment in that position. Claim for loss in compensation by him by reason of displacement from this position effective April 26, 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. The case being deadlocked, Willard E. Hotchkiss was called in as Referee to sit with the Division as a member thereof.

An agreement is in effect between the parties dated January 16, 1929. The parties have jointly certified to the following facts:

"F. C. Paul was regularly employed as highway crossing watchman at Wichita Falls, Texas, having been first hired as such in August 1926 from outside the ranks of Carrier's employees until April 26, 1935, when he was displaced from that position by J. B. Spillman, employed as clerk, who has but one arm. Mr. Paul has worked intermittently on this position since that time. Mr. Spillman's name is carried on current clerks' seniority roster with date of October 8, 1919. Rule 25 (p) of current Maintenance of Way Employees' wage schedule agreement reads:

"(Exceptions) The general rule of promotion and seniority will not apply to positions of track, bridge, and highway crossing watchmen and signalmen at non-interlocked crossings, but such positions will be filled by incapacitated employees covered by this agreement when available, and if not, they may be chosen from any department. This rule not to permit bumping of such incapacitated employee after he is chosen and is capable of filling position to which assigned."

Employees contend that the Railway Company violated Rule 25, paragraph (p), which is quoted in the joint submission under the heading of Exceptions, in allowing J. B. Spillman, employed as clerk, to displace F. C. Paul as highway crossing watchman at Wichita Falls. The Management contends that Mr. Spillman had the right to displace Mr. Paul on account of his disability.

The Employees contend further that Rule 25, paragraph (p) makes no provision for bumping in order to create a vacancy, and that, therefore, the position could only be filled if a vacancy existed. They agree that had there been a vacancy and no incapacitated employee in the Maintenance of Way Department, Mr. Spillman or any other employee could have been assigned to the position. Employees further contend that Mr. Spillman is not incapacitated in accordance with the intention of Rule 25 (p), as he is still physically able to carry

on the work which he had previously performed, and only accepted the crossing watchman position as a temporary position, which they hold is not in conformity with the rules. They maintain that his incapacity was no greater at the time he displaced Mr. Paul than it was at the time he was hired as a clerk on October 8, 1919.

The position of the Carrier was set forth in considerable detail by General Manager Farrington in his statement of January 14, 1936, and further elaborated before the Referee, with citation of Decision No. 1881, Docket 2389, by the U. S. Railroad Labor Board, July 6, 1923.

In brief, the Carrier's position is that Mr. Paul, not being an incapacitated employe, was not exempt from displacement by an incapacitated employee from any department, no incapacitated employee from the Maintenance of Way Department being available. Mr. Paul, the Carrier contends, acquired no seniority rights to the position under Rule 25 (p).

The record contains extensive correspondence between the parties in reference to granting hearing and certain other angles of the case.

This is not a clear cut case from the standpoint of the letter of the agreement between the parties. Superficially, there appears to be some inconsistency on both sides. The Employes, at an earlier date, tried to prevent Mr. Paul's assignment to the position, maintaining that it should be given to an incapacitated employee; whereas, they now ask that Mr. Paul be retained in the position. The Management, on the other hand, rejected the earlier claims of the representatives of the Employes in favor of Mr. Paul, because they said the position required an able-bodied man, and they now propose to place a man of one arm in the position.

These superficial inconsistencies are understandable in the light of all the circumstances, but the Referee finds no justification under the agreement for replacing Mr. Paul.

AWARD

The claim is sustained.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 22nd day of June 1936.