

Award No. 1392
Docket No. MW-1420

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Royal A. Stone, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ST. LOUIS-SAN FRANCISCO RAILWAY**

STATEMENT OF CLAIM: "Claim of T. J. Halkins, B. & B. Mechanic, Central Division, who has served at various periods as B. & B. Foreman, that under the application of Article IV, Rule 1, of current agreement, he is entitled to a hearing to develop and determine why he is denied assignment to a regular position as B. & B. foreman, and that he now be granted such hearing."

EMPLOYES' STATEMENT OF FACTS: "During the past ten years B. & B. mechanic T. J. Halkins has on various occasions served as B. & B. Foreman. In 1939 positions of regular B. & B. foremen were bulletined. T. J. Halkins submitted his bid for the position of B. & B. foreman. However, his bid, or application, was declined, the Division Engineer holding that Halkins lacked the necessary merit and ability. Having acquired experience as a B. & B. Foreman, Halkins maintained that being denied a regular assignment as a B. & B. Foreman was unjustifiable. He considered himself unjustly treated, and requested a hearing under the application of Article 4, Rule 1 of current agreement, to develop and determine in what respect he lacked the necessary merit and ability to entitle him to promotion and assignment as a regular B. & B. Foreman. He was denied such hearing."

POSITION OF EMPLOYES: "T. J. Halkins holds seniority rights as B. & B. mechanic on the Central Division since July 26th, 1919. He is a competent and experienced B. & B. mechanic. As stated in Employes' Statement of Facts, during the last ten years he has served on various occasions as extra B. & B. foreman. Like most men he is seeking advancement. Being a competent and experienced B. & B. mechanic, and having acquired some experience as a B. & B. Foreman, he is looking forward to promotion and assignment as a regular B. & B. Foreman. Thus, when a position of a regular B. & B. foreman was bulletined in November, 1939, he submitted his bid for that position. The Division Engineer, however, holds that regardless of Halkins' qualifications and experience, he lacks the necessary merit and ability to warrant his promotion and assignment as a regular B. & B. Foreman. Halkins cannot understand why he should be adjudged unfit for promotion and assignment as regular B. & B. Foreman. Therefore, in order to develop all the facts in connection with the Carrier's contention that he lacks the necessary merit and ability, Halkins, through his representative, asked for a formal hearing under the application of Article 4, Rule 1, of current Agreement to develop such facts and to ascertain why he was denied assignment sought. Article 4, Rule 1, reads:

'Employes disciplined or dismissed will be advised of the cause of such action, in writing, if requested.'

St. Louis, Missouri
 April 22nd, 1940,
 3007-27.

Mr. A. Shoemake,
 General Chairman, B. of M. of W. E.,
 405-6 Woodruff Building,
 Springfield, Missouri.

Dear Sir:

Yours April 9th, file A-2844, concerning Central Division supervision promoting C. M. Sebourn to position of B. & B. Foreman in preference to T. J. Halkins.

Article 3, Rule 1, of the agreement, states promotion shall be based upon ability, merit and seniority, ability and merit being sufficient, seniority shall prevail, the management to be the judge.

It is the definite judgment of the supervisory officers that Halkins does not have sufficient ability and merit for promotion to position of B. & B. Foreman. Their opinion is based not only on their knowledge of his work and of him, personally, but on the fact that he was tried on a temporary position as B. & B. Foreman five days last year. It may be he will improve to the point where he will be qualified for promotion at some later date.

You ask that he be given an investigation in line with Article 4, Rule 1. I do not consider this necessary and do not see how conducting an investigation would have any effect on the judgment of the management.

Yours very truly,

(Signed) C. P. King,
 Assistant to
 Chief Operating Officer.

"Rule 1, of Article III, is very specific that, 'Ability and merit being sufficient, seniority shall prevail; the management to be the judge.' From the statement given by Division Engineer, Mr. E. L. Collette, previously in this submission, it will be seen that, in his judgment, Mr. Halkins had not acquired sufficient ability to warrant qualifying him as a foreman.

"Numerous awards have been rendered and opinions handed down in connection therewith, on claims for seniority rights where ability was lacking, as in this case, and would refer particularly to Awards Nos. 396, 489 and 772, by this Honorable Board, denying the claims in their entirety, based upon the fact that the 'management is to be the judge.'

"To properly state our position with respect to the specific claim set up by the Employes in the case, it must be said that:

"1. Sebourn was properly assigned under bulletin No. 227, as Halkins, in the judgment of the management, did not possess sufficient merit and ability. Moreover, Sebourn's promotion and assignment was in no way questioned until after he had acquired applicable seniority as a foreman, and Halkins was not entitled to assignment on the permanent position under bulletin No. 278 as he had no seniority as a foreman, whereas Sebourn, who was assigned, did have. And that—

"2. Mr. Halkins was not entitled to an investigation as Article III, Rule 1, definitely places authority for judgment of an employe's ability and merit for promotion with the management."

OPINION OF BOARD: All that is wanted is a "hearing to develop and determine why the claimant is denied" promotion. For the carrier it is frankly conceded that, had the application therefor been made within the

time limited by the rule, a hearing should have been allowed. That requirement is procedural rather than jurisdictional. At the outset the carrier might have declined to consider the matter because the application had not been made in time. But that point was not made. The claim has gone through the usual channels on the property for consideration on the merits. The holding is, therefore, that the carrier waived its right to insist that the claim was not made within the time required by rule.

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 employe should have a hearing.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of April, 1941.