

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

MIDLAND VALLEY RAILROAD COMPANY

**STATEMENT OF CLAIM: "CLAIM OF THE SYSTEM COMMITTEE
OF THE BROTHERHOOD THAT:**

(1) The carrier violated and continues to violate Clerks' Agreement when on April 15, 1940, it assigned switchman J. D. Lewis to the position of Warehouse Foreman, at Tulsa, Okla., covered by Position Bulletin No. 2, posted March 29th, 1940, and declined and refused to favorably consider application made by Clerk H. A. Lewis to such position, and

(2) That Clerk H. A. Lewis, shall now be assigned to position covered by Position Bulletin No. 2 for which proper application was made, and be compensated for wage loss suffered, and

(3) That other employes affected by this violation be compensated in full for wage loss sustained thereby."

EMPLOYES' STATEMENT OF FACTS: "On March 29, 1940 the following bulletin was posted at Tulsa Station by reason of the resignation of C. M. Beatty, Warehouse Foreman.

'STATION—Tulsa, Oklahoma

POSITION BULLETIN

Number 2

The following position at this station is open for bids, Employes desiring this position will file application with the undersigned within five days from the posting this bulletin.

Title of Position—Warehouse Foreman

Hours of Service—8:00 A. M. to 5:00 P. M. daily except Sunday,
with one hour off for lunch.

Rate of Pay —\$5.87 per day.

DATE POSTED Mar. 29, 1940

DATE TAKEN DOWN _____

T. O. ABERNATHY,
Agent

cc C. A. Malone,
General Chairman, B. R. C.,
1537 Houston,
Muskogee, Oklahoma.'

agreement when it refused to make certain assignments because of its conviction that the applicant lacked the necessary fitness and ability, and the 'Opinion of Board' contains the following statement by the Third Division:

'The applicable rules of the Agreement governing the exercise of seniority embrace fitness and ability, as well as seniority, as a relevant consideration. Only when there is sufficient fitness and ability is it provided that seniority shall prevail.'

"There is no merit in the claim and it should be denied.

"Since this is an ex parte case, this submission has been prepared without seeing the employees' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission."

OPINION OF BOARD: The record in this case shows that upon the resignation of the warehouse foreman at Tulsa, Oklahoma, the position was bulletined on March 29, 1940. No bids were received from any employee holding seniority rights in the Tulsa Station and Yard District. J. D. Lewis, employed as a switchman and as a relief yardmaster at Tulsa, bid on the position. H. A. Lewis, employed in the Mechanical Store Department seniority district at Muskogee, Oklahoma, Group 3 seniority roster, likewise bid on the position. Applications were also received from a number of non-employees. Rule 8 (h) of the Clerk's Agreement with the Midland Valley Railroad Company, the carrier involved, is as follows:

"In the event no applications or bids are received for a bulletined position in the district in which the vacancy occurs, consideration will be given to applicants of other seniority districts over non-employees."

No bids having been received from employees in the district where the vacancy occurred, it was the duty of the carrier under the Agreement in force to give consideration to the applications of employees J. D. Lewis and H. A. Lewis over the applications of non-employees. This does not give to the carrier the right to abuse the discretion given to it by the Agreement or to act arbitrarily. A careful reading of this record convinces us that the question of the fitness of the claimant for the position sought was one upon which reasonable minds might differ. Such being the case, it must follow that the prerogative which the carrier has reserved in the Agreement has not been abused.

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 employees involved in 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 evidence of record does not disclose any violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of May, 1941.