

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
ATCHISON, TOPEKA AND SANTA FE RAILWAY SYSTEM**

STATEMENT OF CLAIM: (a) Claim that Mr. K. B. Elliott, assistant signalman, Southern Division, should have been promoted to position of signal maintainer to fill temporary vacancy as signal maintainer at Morgan, Texas, and that he be compensated for the difference in rate of pay actually received as an assistant signalman and the amount paid to the employe temporarily assigned to the signal maintainer's position at Morgan, August 21 to 31, 1941.

(b) Claim that Elliott be given a seniority date in class "B" (Signalman, Signal Maintainer) from date he should have been promoted to position in that class, August 21, 1941.

EMPLOYES' STATEMENT OF FACTS: On August 20, 1941, Mr. E. E. Kennedy, signal maintainer, Morgan, Texas, reported off-duty account of illness. At this time K. B. Elliott was the senior assistant signalman working as such on the Southern Division seniority district. There were no reduced or furloughed signalmen or signal maintainers on that date.

Mr. P. B. Shepherd, who was junior to Elliott in both the assistant's class and the helper's class, was assigned by the Carrier to relieve Signal Maintainer Kennedy. Elliott immediately requested to be assigned to the signal maintainer's position but was denied the position. Neither Elliott nor Shepherd had completed four years' training as assistant signalman or signal maintainer and neither held seniority rights in the mechanic's class.

POSITION OF EMPLOYES: The Brotherhood contends that K. B. Elliott should have been assigned this position in preference to Shepherd and in the order of his seniority. Both men were available and there was nothing to prevent the Carrier from assigning the senior employe to the position. The Carrier's contention that Elliott was assigned to work with a heavy construction gang at Milano and that he could not have been as conveniently released is not supported by the facts and cannot be used in support of the Carrier's position. The availability of an employe in such instances cannot be used to deny an employe a position which he is entitled to or to prevent him from establishing a seniority date as contemplated under the rules.

The very principle of seniority fully supports this claim and the Carrier was obligated to promote the senior employe under the provisions of Article IV, Section 1, of the current agreement. It is here quoted:

"Promotions or transfers to positions coming within the scope of Article I of this agreement, other than Signal Foremen, shall be based

An examination to determine Elliott's ability was not necessary, neither did he request one. It was known that he did not have sufficient ability for the position of signal maintainer.

Assuming that sub-Section (2) of Section 6-(b) of Article I of the Agreement was pertinent to the case, Mr. Elliott had not qualified for the position of signal maintainer.

POSITION OF CARRIER: As determined by the management under its contractual right in Article IV, Section 1, of the Agreement, quoted in the Statement of Facts, K. B. Elliott did not have sufficient ability to be placed upon the vacancy of signal maintainer at Morgan, August 21, 1941. In order for Elliott to be given a seniority date as signal maintainer, it would be necessary for the Board to find that the management did not have the right to determine whether he had the necessary ability for promotion. Such a finding would be in contravention of Article IV, Section 1, of the Agreement.

No evidence has been or can be produced by the Organization to prove any fraud, bias or caprice on the part of the management or any lack of full knowledge of the inability of Elliott to fill the position in question. Consequently, the claim must be denied by the Board.

OPINION OF BOARD: The facts in this claim are not essentially in dispute. The employees state them as follows:

"On August 20, 1941, Mr. E. E. Kennedy, signal maintainer, Morgan, Texas, reported off-duty account of illness. At this time K. B. Elliott was the senior assistant signalman working as such on the Southern Division seniority district. There were no reduced or furloughed signalmen or signal maintainers on that date.

Mr. P. B. Shepherd, who was junior to Elliott in both the assistant's class and the helper's class, was assigned by the Carrier to relieve Signal Maintainer Kennedy. Elliott immediately requested to be assigned to the signal maintainer's position but was denied the position. Neither Elliott nor Shepherd had completed four years' training as assistant signalman or signal maintainer and neither held seniority rights in the mechanic's class."

The employees contend that under the following rules: Article IV, Section 4 (b); Article III, Section 1 (a); Article IV, Section 3; that the Claimant, Elliott, should have been assigned this position instead of Shepherd, because Shepherd's seniority rights were junior to those of the claimant.

The Carrier does not dispute this fact, and had the claimant had sufficient ability he should have been placed upon the vacancy of signal maintainer at Morgan, Texas. Not having that ability, in the Carrier's opinion, the Carrier contends that it was within its rights in assigning Shepherd this position, and relies upon Section 1 of Article IV of the rules of the current agreement (Effective June 1, 1939) which is as follows:

"Promotions or transfers to positions coming within the scope of Article I of this agreement, other than Signal Foreman, shall be based on ability (to be determined by the Management, by an examination if deemed necessary by it or if requested by the employee) and seniority; ability being sufficient, seniority shall govern."

This same rule under the previous agreement (effective February 1, 1929) reads as follows:

"Promotions or transfers shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail; the Management to decide."

In interpreting similar rules to the rule in the 1929 agreement, this Board has held that in the first instance the Carrier must be the judge of the ability of an employe to fill a position, but a Carrier must be free from fraud, caprice, and unreasonableness in making its decision as to an employe's ability.

Under the 1939 agreement, we find the rule very similar to the 1929 agreement, with the following addition in reference to ability: "(to be determined by the Management, by examination if deemed necessary by it, or if requested by the employe)."

By the addition of these clauses, the 1929 agreement was changed. It still gives to the Carrier in the first instance the right to determine the ability of an employe, and if the Carrier has any doubt as to his ability, it may give him an examination to determine that question. But these clauses also give the employe an added right, which is that if the employe thinks he has not been fairly dealt with by the Carrier, he has a right to an examination to prove his ability. This is true, if the employe requests the examination. Of course, the employe is entitled to a fair and reasonable examination by the Carrier; a fraudulent examination would be equivalent to no examination. It would be the same as if the Carrier refused to accord the employe an examination after a proper request for one.

The record shows that the claimant did not request an examination. The Board thinks that such a request is a condition precedent to sustaining the claimant's position. Having failed to request the examination, the Carrier did not violate the current agreement.

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 there was no 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 17th day of December, 1942.