

Award No. 6020

Docket No. CLX-5993

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that:

(a) The Agreement governing hours of service and working conditions between the Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective October 1, 1940, was violated in the Superintendent's Office at Cleveland, Ohio on January 1, 1949, when H. N. Barr was not allowed to return to his position of Assistant Chief Clerk after being relieved from an excepted position; and

(b) He shall now be allowed to displace on the position and be paid the difference between what he received and the amount he would have received had he been allowed to return to his former position, retroactive to and including January 1, 1949.

EMPLOYEES' STATEMENT OF FACTS: Herschel N. Barr was the occupant of position of Assistant Chief Clerk, Superintendent's Office, Cleveland, Ohio, with seniority dating from September 1, 1943, in the seniority district comprising this office. He entered express service at Steubenville, Ohio, and possesses seniority at that point dating from March 15, 1924. Effective May 1, 1945, he was promoted to an excepted position of Special Representative (Rules 16 and 26) in the Superintendent's Office. The vacancy thus created was advertised May 31, 1945 and awarded June 12, 1945 to employe H. E. Alleshouse, the regular occupant of position of Mail and Statistical Clerk, in the same office.

Alleshouse entered service at Dover, Ohio, September 9, 1935, and possesses seniority at that point dating from August 1, 1937. He also possesses a seniority date in the Superintendent's office of June 1, 1942.

H. N. Barr continued in an excepted capacity as Special Representative and later as Clerk in the General Manager's Office at Cleveland until he was relieved therefrom December 31, 1948; thereupon he sought to return to his former position of Assistant Chief Clerk pursuant to Rule 16, but his request to be allowed to do so was denied.

was awarded the position of Assistant Chief Clerk in the Superintendent's office at Cleveland when the junior employe vacated that classified position to accept appointment in the excepted class. Contrast that contention with the claim in Docket 2881 decided by Referee Swacker in Decision E-551, General Charman Geiger, Philadelphia, Pa., to General Agent Blyth, Pittsburgh, Pa., December 2, 1937:

"Claim of Employe Fuller, Union Station Illegal Displacement.

This is to advise that we are hereby protesting illegal displacement whereby employe Brungess was permitted to displace employe Fuller from his position as Assistant Foreman at the Union Station, Fuller being the senior employe.

It is our claim that Mr. Brungess has no right to displace a senior employe under the provisions of our rules, and therefore file on behalf of employe Fuller claim for pay for the time lost by him, or the difference in rate of his earnings as a result of this illegal displacement. We are also claiming time lost for any other employe that may be adversely affected as a result of this illegal displacement."

And the claim in Docket 2882 decided by Referee Swacker in Decision E-551, General Chairman Geiger to General Agent Blyth, December 2, 1937:

"Claim of Employe Cain, East Liberty Station, Illegal Displacement.

This is to advise that we are hereby protesting for and in behalf of employe Cain, because he was illegally displaced from his position as Clerk at East Liberty, Pa.

"This position at one time was held by Mr. Durkin, who was appointed Special Agent and left the position of Clerk at East Liberty vacant. The position was bulletined as provided in Rule 10, as a regular vacancy, and not subject to the return of Mr. Durkin. The position was bid in and was awarded to employe Cain, and employe Cain had more seniority than Mr. Durkin.

We fail to see how under the rules Durkin should be permitted to displace a senior employe. We are hereby claiming pay for any and all time lost by employe Cain or any other employe who might be affected as a result of Cain's displacement.

Will you please favor us with a decision, and oblige."

Mr. Swacker clearly and unmistakably held that junior employes do not have the right under Rule 16 to exercise seniority over senior employes in circumstances such as we have here where the junior employe is relieved of his excepted position and finds that a senior employe has bid in his former classified position vacated at the time of the junior's appointment to the excepted position. Under the facts in the instant case, the applicable rule, and Decision E-551 the claim in the instant case is entirely without merit and should be denied.

All evidence and data have been considered by the parties in correspondence and conference.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in the instant case should be stated although there is no substantial dispute between the parties respecting them.

Effective May 1, 1945, the Claimant, H. N. Barr, who was the regularly assigned occupant of the classified position of Assistant Chief Clerk, at the

office of the Carrier's Superintendent in Cleveland, Ohio, was promoted to an excepted position of Special Representative in such office. The Employees state he had seniority in the seniority district in which the office was located, dating from September 1, 1943, while the Carrier states his seniority therein dates from August 21, 1943. This discrepancy in the facts is of no consequence and hence will be disregarded. Barr filled this excepted position from May 1, 1945, to September 16, 1947, when he was promoted to the position of Clerk in the General Manager's office, also an excepted position.

Following Barr's appointment to the position of Special Representative, the vacancy thus created in his position of Assistant Chief Clerk was bulletined and eventually awarded to H. E. Alleshouse, the then regularly assigned occupant of position of Mail and Statistical Clerk in the Superintendent's office, who had been filling the latter position since June 1, 1942, and hence held seniority in such office as of that date.

On January 1, 1949, the General Manager's office at Cleveland was moved to Detroit. Barr declined to follow his excepted position of Chief Clerk to Detroit and by letter, dated December 14, 1948, to the Carrier's Superintendent, requested that he be permitted to exercise his rights, under Rule 16 of the current Agreement, to return to the position of Special Representative. This request was denied by the Carrier under a letter, dated December 29, 1948, on the ground Barr could not displace Alleshouse as Assistant Chief Clerk in the Superintendent's office because of the latter's higher seniority rating. Specifically this letter stated that while Rule 16 applied to employees returning to classified service from excepted service Alleshouse was the senior employee and would be in position to immediately displace Barr. In due course the instant claim was filed with the Carrier, denied on the property, and reached this Board in the form set forth in portions of the record preceding our Opinion.

Before leaving the facts we pause to note no claim is made in this case that the rights of the parties are affected in any manner by the fact Barr was eventually promoted from the position of Special Representative to Chief Clerk or that he refused to follow the latter position to Detroit. The result in those matters are not here involved and for that reason will not be given consideration or hereafter mentioned.

The Carrier asserts, and the Organization agrees the only issue before this Board is the interpretation to be given the first paragraph of Rule 16 in a case wherein a junior excepted employee, relieved from an excepted position, demands the right to displace a senior employee who is then occupying the classified position vacated by the junior when promoted to the excepted position. In turning to the first paragraph of Rule 16 of the current Agreement we find it reads as follows:

"Status After Leave of Absence or When Relieved from Temporary Assignment, Excepted or Official Position—Rule 16. An employee returning after leave of absence or when relieved from temporary assignment, excepted or official position, may return to former position or may—upon return—or within (3) days thereafter, displace a junior employee who has bid in a position bulletined during such absence."

While the Organization agrees the issue involved is the one heretofore stated it also contends that Rule 26 of the Agreement supports its interpretation of Rule 16, i.e., that an employee assigned to and subsequently relieved from an excepted position has the right to return to his former position. So far as pertinent this rule (26) reads:

"Employees now filling or promoted to excepted or official positions shall retain all their rights and continue to accumulate seniority in the district from which promoted."

In its defense of the claim the Carrier is forced to take an anomalous position. For that matter in contending for a sustaining Award the Organization is in the same situation. The record discloses that on February 5, 1948, in Decision E-551, the Express Board of Adjustment No. 1 with the assistance of a referee construed the very portion of Rule 16 here in question and held that under its terms employees relieved from excepted positions and desiring to return to their former positions had the right to exercise their seniority over junior employees but not senior employees, with the result a claim against the Carrier was sustained because it had reassigned junior employees to their former positions. Thus it appears that in the instant case we have each of the parties seeking a construction of Rule 16 directly contrary to the one contended for in their presentation of the issues in Decision E-551, supra. Here the Organization contends that decision should be overruled as erroneous. There it sought and procured it. There the Carrier sought to obtain the construction now contended for by the Organization. Here it seeks to uphold the interpretation there procured by the Organization as a valid and controlling precedent.

This Division of the Adjustment Board believes in, and has a record for adhering to sound precedents. Nevertheless, it has not hesitated to hold contrary to the decisions of other tribunals when convinced they are clearly wrong and we shall not do so here.

When the quoted provisions of Rule 16 are carefully analyzed we think its terms are so clear and unambiguous the only construction to be given them is that an employee relieved from an excepted position may return to his former position. To hold otherwise would read something into the rule that is not there and give it a strained and unwarranted construction. The word "or" according to all well accepted definitions is a coordinating particle that marks an alternative. The obvious result, giving its language the common and ordinary meaning to which it is entitled, is that the rule means that when an employee is relieved from his position under circumstances such as have been here related he is either entitled (1) to return to his former position or (2) displace a junior employee who has bid in a position bulletined during his absence. So construed, we are forced to the conclusion the rule requires that Barr be returned to his former position even though after he left it to assume an excepted position it was assigned by bulletin to Alleshouse, a senior employee. The Carrier points out that Alleshouse, through the exercise of seniority rights, could displace Barr on his return. In our opinion that makes no difference. However, that question is not before us and we do not here pass upon it. The Agreement gives the latter that right in plain and unmistakable language and he is entitled to exercise it regardless of what the future may bring forth. For all we know Alleshouse might be satisfied, as he was before, to fill his former position. In any event we have no right to speculate upon that possibility or use it as a means for avoiding a proper interpretation of the Agreement.

The fact Barr should be returned under terms of the current Agreement to his former position does not mean this claim can or should be sustained in its entirety. Having procured the interpretation in Decision E-551, supra, under conditions and circumstances as heretofore related, we do not think the Organization should be permitted to predicate a monetary claim on action taken in strict accord with its requirements unless and until it obtained a contrary construction of the Agreement. Barr, who under our decisions is a party thereto, is in no better situation. Therefore we hold that Claim (a) should be sustained. As to Claim (b) we hold that Barr should be returned to his former position within 30 days from the adoption of the Award within retroactive reparation.

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 Employes involved in this dispute are respectively Carrier and Employes within the meaning 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 Carrier violated the Agreement.

AWARD

Claim (a) sustained. Claim (b) sustained in part and denied in part, all as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of November, 1952.