

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

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

**FLORIDA EAST COAST RAILWAY
W. R. Kenan, Jr., and S. M. Loftin, Receivers**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

"The Carrier failed and refused to comply with the provisions of Rules 16 and 19, of the Clerks' Agreement, when its local officers disqualified E. P. Birch after having failed and refused to cooperate with said E. P. Birch in his efforts to qualify as Multigraph Operator, St. Augustine Stores Department;

"That E. P. Birch be restored to position of Multigraph Operator, Stores Department, St. Augustine, and further shall be afforded reasonable advice, instructions and assistance, over a reasonable period of time not to exceed 30 days, in his efforts to qualify, and

"That E. P. Birch and other employes affected shall be reimbursed for monetary losses suffered as a result of Carrier's violation of agreement rules."

EMPLOYES' STATEMENT OF FACTS: "On April 28th, 1939, Acting Stationer H. A. Germain issued bulletin No. 1, abolishing temporary position of Stationary Helper, present incumbent E. P. Birch, effective at the end of business April 30, 1939. On the same date Mr. Germain addressed a letter to Mr. Birch advising him that he would be placed on furlough at close of business April 29, 1939, notwithstanding the fact that Mr. Birch, with seniority date as of February 11, 1935, had sufficient seniority to displace junior employes, and, under the terms of the agreement, had ten days in which to make a displacement. On May 3rd, Mr. Birch advised Mr. Germain that he desired to exercise his seniority over Mr. N. W. Mier, whose seniority dates from December 1, 1937, and take over the position of Multigraph Operator. On May 5, 1939, his file 157, Mr. Germain wrote Mr. Birch as follows:

"I have your letter of the 3rd, in which you state you expect to exercise your seniority rights and take over the position of Multigraph Operator.

"This is to say I do not consider you have sufficient fitness and ability, as required, Rule 8, of the agreement. In conversation, you admitted you had no experience on the multigraph machine."

"Mr. Birch, who had returned to his home at New Smyrna Beach, was advised on May 13, 1939, through Mr. F. H. Herring, Storekeeper at New

Clerk Birch an opportunity to demonstrate his qualifications under pay and under actual service conditions connected with the position. His complete failure to perform the duties of the position simply confirmed the belief of the carrier that he was not competent to make the displacement.

"4. The contention of the Brotherhood that Clerk Birch should be restored to the position of Multigraph Operator and 'be afforded reasonable advice, instruction and assistance over a reasonable period of time, not to exceed thirty days, in his efforts to qualify' is just as unsound as if the contention should be made that the carrier should allow an employe who is not a stenographer, to displace a qualified competent stenographer, on the theory that the employe making the displacement should be given 'advice, instruction and assistance' by the carrier to learn shorthand and typing within a period of thirty days. The position of Multigraph Operator is a highly technical one and the rate of \$5.8901 per day was established in recognition of the especial training, technical knowledge and skill, required of the incumbent of a position of that kind. The necessary skill and technical knowledge cannot be acquired in a period of thirty days or less, any more than a knowledge of stenography and typing can be acquired within a similar period of time. There is no obligation under the rules of the agreement for the carrier to give any employe a period of schooling or instruction, with pay, to permit that employe to equip himself with the necessary skill and knowledge to fill a position requiring special technical qualifications. The carrier fully appreciates the natural desire of Clerk Birch to improve himself and move to a position carrying a higher rate of pay, but it is not an obligation of the carrier to give Mr. Birch technical schooling, under pay, so that he may equip himself for advancement.

"The Florida East Coast Railway reserves the right to introduce and examine witnesses in support of its position in connection with all issues in this case, and to cross-examine witnesses who may be introduced by petitioners, as well as to answer any further or other matters advanced by such petitioners in relation to such issues, whether oral or written. All of the matters cited and relied upon by the carrier, have been discussed with the employes."

OPINION OF BOARD: The facts, the rules and the contentions of the parties are set forth above.

It is clear that claimant was senior to the employe whom he sought to displace, but his seniority, while essential in any event, was not the sole requirement. In addition to seniority, it was necessary that he possess fitness and ability. Rule 8. Ordinarily, seniority is of simple ascertainment and stated in unquestioned mathematics. It was so here; but fitness and ability connote matter of opinion. Whether fitness and ability attend in a given case, as often has been ruled by this Division, good faith obtaining, rests primarily with the carrier. Awards Nos. 52, 82, 110, 324, 396, 592, 772, 1009. Proceeding so, an included question is, When must the carrier exercise that prerogative to make it effective beyond cavil? Fairly, as we think, and as seems to be the doctrine of our decisions, the carrier should give an adverse decision at the inception of demand by one employe to displace another, that is to say, prior to assigning the aspiring employe to the position. Here, although the carrier had stated to claimant that it did not regard him as possessing ability and fitness for the position, proceeded, nevertheless, to assign him thereto and furlough his predecessor. Thereafter, as we perceive, the situation came within the provisions of Rule 16, paragraphs (a), (b), and (c). Under (a) applicant was assigned, as seems unquestioned; under (c) he was entitled to full cooperation of department heads and others in his efforts to qualify; and under (b) he was subject to removal on determination as the result of hearing that he could not qualify. There was determination by the carrier, based on hearing, to the effect that applicant did not possess the requisite fitness and ability, and except for the claim that paragraph (c) was disregarded by the carrier, which we shall

next examine, what we have said would result in findings adverse to applicant. Our study leads us to conclude, however, that, while there is much to indicate applicant's lack of ability to operate the machine, use of which attended the position he was seeking through displacement, we are not convinced that had he enjoyed friendly and helpful cooperation as contemplated by the rule, he would have failed to qualify; and that there was no such cooperation abundantly appears by the record. It follows that applicant should be restored to the position to which the carrier assigned him, as we have seen, and afforded reasonable opportunity, the rules considered, to qualify therefor; and in his efforts to qualify he should enjoy sympathetic cooperation "of department heads and others," within the considerate purpose of the rule.

We are not disposed to think the question of reimbursement is cognizable at this time. The applicant has yet to demonstrate his fitness and ability, and should he fail to qualify for the position, he would not only not have earned compensation in the interim, and, of course, should not receive it, but would then be without basis for claim for compensation; but should he succeed in his quest for preferment, a claim by him then for monetary losses, if any, may well be the subject of negotiation between the parties.

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 carrier violated paragraph (c), Rule 16.

AWARD

Claim (1) sustained; claim (2) not now pertinent.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of December, 1940.