Award No. 5128
Docket No. TE-5082

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY
(Buffalo & East)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad Company, Buffalo and East, that

(a) The Carrier improperly denied Mr. F. J. Spray with seniority date of February 5, 1946, the right to exercise his seniority to position held by Mr. K. F. Guarigla, seniority date of October 18, 1947, and

(b) In consequence of such violation Mr. Spray shall be assigned to Job No. 12 in "BO" Relay Telegraph Office, Buffalo, New York, and

(c) Shall be compensated for any wage loss suffered, plus other payments under the provisions of Article 13 of the Telegraphers, Agreement, since September 1, 1949.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties herein referred to as the Telegraphers' Agreement, bearing effective date of July 1, 1948, as amended September 1, 1949, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

With the advent of the 40-hour work week commencing September 1, 1949 and the changing of all relief schedules on the Buffalo Division to conform therewith, Mr. F. J. Spray the claimant in this case had his relief position abolished.

In accordance with the provisions of the rules of the Telegraphers' Agreement Mr. Spray made written displacement claiming Job No. 12 which was held by a junior employe Mr. K. F. Guarigla. Mr. Spray was listed as No. 444 with seniority date of February 4, 1946 and Mr. Guarigla was listed as No. 488 with seniority date of October 18, 1947. Both were on the same Seniority Roster.

Despite the fact that Mr. Spray has worked in "BO" Relay Telegraph Office as an extraman and on a regularly assigned position, Carrier denied him the right to exercise his seniority on a position in that office commencing September 1, 1949.

POSITION OF EMPLOYES: As indicated in the Employes' Statement of Facts, claimant F. J. Spray is senior to K. F. Guarigla on the seniority district concerned in this claim.

right to judge qualifications, and this is a basic principle that is embodied in the seniority rules of the agreement.

The current agreement became effective July 1, 1948, with amendments effective September 1, 1949 in order to make the agreement conform with the 40-hour week agreement of March 19, 1949.

This claim has no merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On August 20, 1949, the employe whose seniority rights are in question, notified management that on account of his job being abolished he desired to displace on Job No. 12, classified as Teletype Operator, hours 4 P.M. to 12 o'clock midnight, effective September 1, 1949. The agreement affords displacement rights under such circumstances to the senior qualified employe. The employe's seniority entitled him to the job, but the Carrier held he was disqualified when he failed a test by which he was required to correctly punch tape or type by direct keyboard, at the rate of sixty words of six characters each per minute.

In disputes of this character the Board has long recognized that fitness and ability in the first instance is a matter which rests in the sound discretion of the Carrier and, unless there is a clear showing of abuse of that discretion, the Board will not interfere with the Carrier's judgment once exercised. Accordingly, our attention is first turned to the question of whether the Carrier abused its discretion when it disqualified the employe as the result of the test given.

Ordinarily the Carrier may require a test to assist in determining fitness of an applicant for a position. Compare Awards 4918 and 5025.

In this case the record shows that on August 2, 1944, the parties entered into a written agreement for qualifying applicants for positions of Teletype Operator by the testing technique in question. The Organization proposed, in April 1945, a general rules revision. After prolonged negotiations it was agreed by the parties to invoke arbitration, and the Carrier proposed inclusion of the testing procedures of the August 2, 1944 agreement in the new agreement. The arbitration award was silent on the Carrier's proposal and, thereafter, the current agreement was executed effective July 1, 1948, without reference to qualifying applicants for Teletype Operator positions by tests.

Further, the current agreement expressly provides that it supersedes the agreement of January 1, 1940, supplements thereto, and interpretations thereof. The Organization now argues that the August 2, 1944 agreement was supplementary to the January 1, 1940, agreement and is expressly abrogated by the agreement now in effect. The Carrier contends that the two agreements are unrelated and each represented a separate and independent understanding.

The Carrier's contention does not stand up under close scrutiny of the August 2, 1944 agreement. The agreement is not complete unto itself. It is between a number of different railroads and the organization, and has for its express purpose the amendment of the scope rule of the telegraphers' agreements on each of the lines of railroads signatory. It is interrelated and dependent upon the separate telegrapher agreements for rate fixing purposes, seniority, and the filling of vacancies and new positions. It is subject to change on the part of any one of the parties signatory on proper notice. When the organization proposed a general rules' revision, the Carrier must have accepted the proposal as notice to change not only the January 1, 1940 agreement, but to change the August 2, 1944 agreement as well, because there was put in issue by negotiations and included in arbitration the testing procedures of the latter agreement. When the test requirements were not incorporated in the current agreement it now seems inappropriate for the Carrier to revive the claimed right to require a test to assist in determining fitness of an applicant for a position when that right had been put in jeopardy and lost. Therefore,

we think the Carrier acted arbitrarily and abused its discretion when it disqualified the applicant for the position in question as the result of a test which had been eliminated from the agreement through negotiation, arbitration and the signing of a new agreement.

We hold that the right which the Carrier earlier enjoyed by express agreement, was abrogated by the silence of the current agreement on testing procedures which the organization proposed should be eliminated, and which proposal thereafter was carried to arbitration by the Carrier without a sustaining award.

While we hold that the Carrier abused its discretion, we do not agree that Article 16, Section 2(c) entitles the employe to a trial, training, or breaking in period. The subject article applies to students and others such as applicants for employment, extra men, etc. Clearly the employe in question does not come within the rule. Neither do we think an employe under the agreement "owns" a position to which he aspires by reason of his seniority. Under an agreement providing for straight seniority this might be true, but here the employe must have both the seniority and qualifications. Before he has a vested interest in the position he must demonstrate to management, acting within reasonable bounds, that he has the required fitness and ability for the position. It is not necessary though that he be the best man for the job or that he possess the highest skills or show the greatest promise of any one of those vieing for or installed in the position. It is enough that he meet the usual and normal job requirements of the position he seeks. All of such considerations are fundamental and deserve the close attention of the parties in resolving this dispute.

We believe the parties have overlooked these vital considerations due to differences existing over rules interpretations. It being the function of management in the first instance to determine the qualifications of its employes, we do not believe it proper for this Board to undertake the selection on the record we have before use. Accordingly, we remand this case for further consideration of the parties, in accordance with the views herein expressed, and if the employe be found qualified the assignment should be made in accordance with Article 28(b) and an adjustment of wage losses, if any, should be made in accordance with the rules of 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 the agreement was violated as shown by the opinion.

AWARD

Claim remanded for further proceedings in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of November, 1950.