

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT: This is a re-submission of the case covered by Award No. 902 of this Division, which remanded the matter for development of information indicated by that award as requisite to a proper decision of the controversy. The facts and arguments will not be repeated here, reference being made to the full statement in that request contained in Award No. 902.

Subsequent to the rendition of Award No. 902, the parties have conferred and endeavored to develop if, as provided in the award, Miss Stupasky complied with the requirements of Rule 18 (e) in November 1937. Their joint statement with respect thereto and their contentions thereon appear below:

"Please be referred to your Board's Award 902, Docket CL-932, issued under date of July 24, 1939, particular reference to that portion incorporated under the heading 'Opinion of the Board' reading:

'The Case should be remanded to the parties to ascertain whether or not in November, 1937 Miss Stupasky complied with the requirements of Rule 18 (e). If she did not, the claim is sustained; if she did, the claim is dismissed. If there is dispute as to the fact, the case may be resubmitted.'

"The two parties to said dispute take this means of certifying to your Board their inability, after reasonable efforts, to agree on the question of fact as remanded to them by your Board for determination, and to re-submit such dispute to your Board for reconsideration and final determination in accordance with the Opinion, Findings and Award of your Board recorded in said Award 902.

"For the accomplishment of such reconsideration and further action on the part of your Board, there is attached hereto and by reference made a part hereof, separate briefs of the two parties recording in detail relevant facts and arguments in support of their respective positions in this dispute.

"Wherefore, the two parties request appropriate action on the part of your Board in final determination of the question of fact remanded to them by your Board, to wit:

'Whether or not in November, 1937 Miss Stupasky complied with the requirements of Rule 18 (e).'

"Your acknowledgment of this re-submission of dispute and advice as to actions taken or to be taken will be appreciated. You will note no oral hearing is desired.

"Respectfully submitted,

(Signed)
Geo. M. Harrison
Grand President
For the Brotherhood

(Signed)
C. B. Moore
General Chairman
J. B. Parrish
Assistant Vice-President"

"STATEMENT OF FACTS AND POSITION OF THE BROTHERHOOD
IN RE AWARD 902 DOCKET CL 932.

"1. It is the position and contention of the Brotherhood that Miss Rose Stupasky **did not** in November, 1937 nor at any other time comply with the requirements of Rule 18 (e) in that she **did not** file her name and address, nor a copy of same, with the Division Chairman of the Brotherhood, nor did she, in any manner, renew any previous filing of same with said Division Chairman.

"2. As proof of the above allegation and contention, we submit herewith and by reference make a part hereof photostat copies of notarized statement of W. M. Collins, certifying that—

(a) He, W. M. Collins, was Division Chairman of the Brotherhood in the Carrier's General Offices in which Miss Stupasky was employed in November 1937;

(b) Miss Stupasky did not file a copy of her name and address with him in compliance with Rule 18 (e), and further that

(c) Miss Stupasky told him that she had failed to file her name and address with him.

"3. In the interest of clarity and in further support of the allegation and contention recorded in Item 1 above, we hereby stipulate and affirm that prior to the formal filing of the claim out of which the dispute embraced by Award 902, Docket CL-932 arose, Miss Stupasky was contacted personally by Division Chairman Collins to discuss the matter of her failure to comply with Rule 18 (e), at which time Miss Stupasky verbally advised Mr. Collins that she had never filed her name and address, nor a copy thereof, with him.

"In this connection, it is further stipulated and affirmed that the above stated fact and information was furnished to the representatives of the Carrier by the undersigned C. B. Moore, as General Chairman, prior to the original submission of the dispute to your Board and such statement of facts and information was not denied nor controverted by the Carrier in any manner, shape or form until after Award 902 was rendered by your Board.

"Further, in this connection we stipulate and affirm that the omission of a definite and specific certification in our portion of the original joint submission and rebuttal brief in Docket CL-932 that Miss Stupasky failed, and admitted that she failed, to file her name and address with Division Chairman Collins in November, 1937, was due to the fact that it was an admitted fact of which the Carrier had been apprised and one which the Carrier's representatives had never attempted to deny or controvert. That is the reason for and the basis of fact upon which the allegation

'However, when Agreement No. 6 became effective, she was at that time still cut off and she failed to comply with the provisions of Rule 18 in that she did not furnish the Division Chairman with a copy of her name and address (this is admitted by her), thereby forfeiting her seniority rights under the Agreement.'

recorded in the first paragraph, page 3 of the Joint Submission, was based. That allegation and statement of fact was intended by us to cover all period of time subsequent to the effective date of Agreement No. 6, including November, 1937.

"We should like to further state here that we had been convinced that Miss Stupasky's failure to comply with Rule 18 (e) in November, 1936 had been accepted by herself and by the representatives of the Carrier as an established fact which resulted in forfeiture of her seniority date, therefore, the removal of her name from the 1937 Roster was imperative under the rules.

"On October 10, 1939, conference was had with Messrs. G. M. Seaton, Jr., C. A. Sanders and M. E. Cridlin, Assistant Supervisors of Wages and Working Conditions, in an effort to have the Award of the Board made effective. During this conference, Mr. Seaton advised that Miss Stupasky had signed an affidavit stating that she sent a copy of her letter of November 4, 1937, filing her name and address with Mr. C. W. Johns, Chief Engineer, to the Division Chairman of the Brotherhood, and for that reason the Management felt that the claim was dismissed. I quote below the last paragraph of Assistant Vice-President Parrish's letter of October 17, 1939:

'We have an affidavit signed by Miss Rose Stupasky stating she sent a copy of her letter of November 4, 1937, addressed to Mr. C. W. Johns, Chief Engineer, renewing her name and address, to the Division Chairman of the Brotherhood of Railway and Steamship Clerks, in view of which it is our understanding, as set out in the Opinion of the Board quoted above, that the claim in this case is dismissed.'

"During conference with the Management on October 10, statement was made to the three Assistant Supervisors of Wages and Working Conditions that Miss Stupasky had not filed a copy of her name and address with the Division Chairman during the month of November, 1937, and that she should be removed from the position. I further stated that the Management was aware of this fact when it prepared its submission to the Board in opposition to our claim. I further stated that before the claim was presented to the Board, Miss Stupasky never made any such presentations to the Management or our Committee that she had filed a copy of her name and address with the Division Chairman. Rather she admitted of her own free will and accord that she had not filed with the Division Chairman. This position is not only supported by our presentations to the Board, but by the presentations of the Management.

"During November, 1937, the period in which Miss Stupasky failed to file a copy of her name and address with the Division Chairman, Mr. W. M. Collins, now Vice-General Chairman, was Division Chairman of the General Office District, in which Miss Stupasky is located. Mr. Collins talked to Miss Stupasky before the claim was ever presented to the Management, and she freely admitted to him that she had never filed a copy with him. This statement I made to the Management and in my submission to the Board, and it was never contested or denied by anyone until after the Award of the Board was rendered.

"In spite of all of the information contained in the file supporting our position, in view of Miss Stupasky's having made an affidavit that she filed a copy of her name and address with the Division Chairman in November, 1937, I again contacted the former Division Chairman Collins in order to recheck the information which I had from him. Mr. Collins advised very definitely that he had never received a copy of her filing in November, 1937 or any other time, and that she freely admitted this to him in his conversation with her before the claim was ever presented to the Management, and in support of this statement I attach photostatic copy of affidavit received from Mr. Collins, dated November 1, 1939.

"At this point, I would like to quote my letter to Mr. Parrish of October 23, 1939:

'October 23, 1939.
File GO-43

'Mr. J. B. Parrish,
Assistant Vice-President,
C. & O. Railway Company,
Richmond, Virginia.

'Dear Sir:

'Referring to yours of October 17, file CB-4-N, concerning Award 902 of the Third Division, National Railroad Adjustment Board, and our claim reading:

- (a) Claim of the System Committee of the Brotherhood of Railway Clerks that Mary O. Hunt be placed on position of Stenographer as advertised by Bulletin No. 26, October 12, 1938 in office of Chief Engineer and compensated for all wage loss sustained; and
- (b) That Miss Rose Stupasky be removed from position of Stenographer in office of Chief Engineer and her name removed from the seniority roster; and
- (c) That all other employees affected by the illegal assignment of the position of Stenographer to Miss Rose Stupasky be compensated for any and all wage loss sustained.

'I conferred with Mr. Seaton concerning this matter October 10, at which time he made the same representations to me as set forth in your letter concerning the statement of Miss Stupasky that she did forward to our Division Chairman in November, 1937 a copy of her filing of name and address as made with the Chief Engineer.

'Confirming my statement to Mr. Seaton in conference, I think the case is too well proven for either the Carrier or Miss Stupasky at this late date to now seek the defense in their efforts to prevent the Award becoming effective that she even attempted to comply with the rule.

'In the first place, Miss Stupasky admitted to our representative before the claim was ever started that she did not at any time file a copy of her name and address with our Division Chairman. In the second place, if you will refer to Page 5 under the Position of the Carrier as set out in your submission to the Adjustment Board, you will find the following:

"Miss Stupasky advises, however, that she was not furnished a copy of the Agreement while she was cut-off, and, as a matter of fact, has never been furnished a copy of the Agreement by the clerks' representative as was agreed that they would do. It is entirely inconsistent, therefore, for the employees' representative to protest the seniority standing of an employee based on alleged violation of an Agreement rule when they had not furnished a copy of the Agreement to the employee, as they had agreed with the management to do."

'Two paragraphs further on we find the following quotation from your Position:

"As stated above, Miss Stupasky was not furnished a copy of the Agreement by the employees' representatives. Not having a copy of the Agreement, she knew nothing of any provision for a copy to the Division Chairman; and she naturally, filed

a letter with the carrier renewing her name and address as she had always done, i. e., with the Chief Engineer."

(The underscoring is ours.)

'It will here be noted that the vacancy on which Miss Stupasky was called back, which gave rise to the instant claim, was not advertised until October 12, 1938 and that it was some time thereafter before the Carrier began its investigation to determine the facts. Therefore, the statement which you made in your submission to the Adjustment Board that Miss Stupasky advises, etc., was taken from Miss Stupasky subsequent to our filing of the claim and your statement as contained all through your submission that Miss Stupasky advised you that she knew nothing about the new Agreement or the requirement to file with the Division Chairman is entirely too definite for either the Carrier or Miss Stupasky to now put up the defense that she did file with the Division Chairman, which of course is untrue, as I am prepared to prove by affidavit from our Division Chairman.

'Just in order that we might better understand each other and not overlook facts, it would be my suggestion that you and I confer, as I am convinced that you are being misled by someone who is attempting to produce fraudulent papers in an effort to nullify the conditions which the facts support; in other words, to prevent Miss Stupasky being removed from the service of the Railway for having failed to file a copy of her name and address with the Division Chairman. The Award makes that mandatory.

'It will be appreciated if you will let me hear from you at your earliest convenience.

'Yours truly,

C. B. Moore,
General Chairman.'

After writing the above letter, I conferred with Messrs. Parrish and Seaton on October 25 and discussed this case, at which time Mr. Parrish admitted that the presentations I had made were true, but stated that he did not know what to do in the face of the affidavit by Miss Stupasky. I told him at the time that Mr. Collins, the former Division Chairman, would furnish him with an affidavit, if necessary, to the effect that Miss Stupasky had not filed her name and address with him, and under date of November 15, 1939, I addressed a letter to Mr. Parrish, attaching a copy of the affidavit secured from Mr. Collins, resulting in Mr. Parrish's writing me under date of November 21, his letter reading in part as follows:

'Miss Stupasky denies telling Mr. Collins that she failed to file copy of her name and address with him, and has furnished affidavit to the effect that she did send a copy of her letter of November 4, 1937, addressed to Mr. C. W. Johns, renewing her name and address, to the Division Chairman. A copy of this affidavit is attached.

'In view of the conflicting statements in this case, I see nothing else to do but re-submit the case to the National Railroad Adjustment Board, in accordance with the opinion in Award 902.'

"In view of our inability to bring about a settlement of this matter with the Management, we re-submit the case and respectfully request that your Board give consideration, in addition to the joint submission of the parties and our Rebuttal Brief, to the following facts:

"1—Miss Stupasky did not comply with Rule 18, Section (e), as she failed to file a copy of her name and address with the Division Chairman during November 1937.

"2—This claim was not filed with the Management until October 19, 1938. Just prior to our filing this claim with the Management, Miss Stupasky admitted to Mr. Collins, Division Chairman, that she had not filed her name and address with him. This statement is found in joint submission to the Board under 'Position of Employes,' Page 3, first paragraph, line 7, and not questioned nor denied by the Management at any time.

"3—In the joint submission to the Board under the 'Position of the Carrier' on Page 5, we find the following:

'Miss Stupasky advises, however, that she was not furnished a copy of the Agreement while she was cut off, and as a matter of fact, has never been furnished a copy of the Agreement by the clerks' representatives as was agreed that they would do.'

We deny having agreed to furnish cut off clerks with copies of the Agreement, and this matter treated with by the Board in its decision. It will be noted that the Management made the statement that Miss Stupasky had advised the Management that she had never been furnished with a copy of the Agreement, this statement being made more than a year after the period in question, November, 1937.

"4—Under the Position of the Carrier, third paragraph, Page 5, we find the following:

'As stated above, Miss Stupasky was not furnished a copy of the Agreement by the employes' representatives. Not having a copy of the Agreement, she knew nothing of any provision for a copy to the Division Chairman, and so naturally, filed a letter with the Carrier renewing her name and address as she had always done, i. e., with the Chief Engineer, in a letter dated November 23, 1936. Copy of this letter is attached as Carrier's Exhibit "A".'

"Exhibit 'A' is a copy of the letter filed by Miss Stupasky with the Chief Engineer, as taken from the files of the Chief Engineer. It will be noted that there is no reference on this Exhibit showing a copy even having been mailed or addressed to the Division Chairman. I call this to your attention with emphasis, as it will have a very particular significance a little later on.

"5—I will now quote the fourth paragraph of Page 5 under the 'Position of the Carrier.'

'On November 4, 1937, Miss Stupasky again filed her name and address with the Chief Engineer in accordance with Rule 18 (e) of Agreement No. 6, a copy of this letter being attached as Carrier's Exhibit "B".'

"Your particular attention is directed to the Carrier's Exhibit 'B' as attached to the joint submission and referred to above, from which it will be noted that the Carrier presents this Exhibit as taken from the files of Chief Engineer Johns and there is no reference on this Exhibit showing any attempt on the part of Miss Stupasky to file a copy with the Division Chairman.

"6—At this point I would like to refer you to Employes' Exhibit 'A' attached, which is a copy of the affidavit made by Miss Stupasky and furnished me by the Carrier, together with Employes' Exhibit 'B,' furnished me by the Carrier and attached to the affidavit, which the Carrier informs me Miss Stupasky alleges is a copy of the letter which she filed with Chief Engineer Johns, November 4, 1937, filing her name and address.

"It will be noted in the affidavit signed by Miss Stupasky she certifies that the photostatic copy which she furnished the Carrier, and which is attached as Employes' Exhibit 'B' is a copy of her letter of November 4, 1937, which she alleges she sent to the Division Chairman. She further certifies that the original of this same letter was in the files in the office of Mr. C. W. Johns, Chief Engineer.

"In order to prove that Miss Stupasky did not file a copy of her name and address or even attempt to with the Division Chairman in November, 1937, I think we need go no further than to compare Employes' Exhibit 'B' alleged and certified by Miss Stupasky to be a copy of the letter she filed with the Chief Engineer, November 4, 1937, with the Carrier's Exhibit 'B,' as taken from the files of the Chief Engineer attached to and made a part of the Carrier's position in the joint submission of the original dispute in this case to your Honorable Board. It will be noted on the Carrier's Exhibit 'B' that it does not contain any provision for copy to the Division Chairman, yet the Employes' Exhibit 'B,' which Miss Stupasky certifies and swears to in her affidavit as being a copy of the same letter, shows—

'Copy—Division Chairman, Brotherhood of Railway and Steamship Clerks, Richmond, Virginia.'

"Summing up the whole case, we submit that many months subsequent to November, 1937, the period in dispute, Miss Stupasky, who had failed to file a copy of her name and address with the Division Chairman, admitted to this same Division Chairman that she had not filed; that the Carrier under its Position in the original joint submission of this case to your Honorable Board states very specifically that Miss Stupasky had advised it that she had never received a copy of the new Agreement, that she did not know that it was necessary to file a copy with the Division Chairman, and in so many words, states that she did not file a copy with the Division Chairman. From the very beginning, I advised the Carrier that Miss Stupasky had admitted to our Division Chairman that she had not filed a copy of her letter with him, and this statement was never questioned or denied by the Carrier or Miss Stupasky at any time prior to the Award being rendered. Shortly after the Award was rendered, I was taken ill and was absent from the office for several weeks. Account of this, it was October 10 before I was able to meet the Management in an effort to place the Award into effect, as the Management had made no effort to carry out its provisions until I conferred with it. It will be noted that the affidavit signed by Miss Stupasky was not signed until four days after I had conferred with the Management concerning this Award, the date of the affidavit being October 14, 1939, our conference being held on October 10, 1939.

"It will be noted further that during all the handling of this case Miss Stupasky had never attempted to use any such defense as she and the Management are now putting up. Rather, all of the evidence of the Management in their original submission, as well as Carrier's Rebuttal Brief, or oral presentation as they called it, tends to show that Miss Stupasky did not know it was necessary to file a copy with the Division Chairman and did not do so; and finally, by a comparison of the Carrier's Exhibit 'B' attached to their original submission and the Employes' Exhibit 'B' attached hereto, it will show beyond question that they are not one and the same document.

"The Division Chairman did not receive a copy of Miss Stupasky's filing of her name and address in November 1937, and this statement is supported by the Division Chairman's affidavit to that effect, shown as Employes' Exhibit 'C.'

"We most respectfully request your Honorable Board to sustain the Position of the Employee. No oral hearing desired."

CARRIER'S STATEMENT: "Referring to your Board's Award 902, dated July 24, 1939, covering the following claim:

'(a) Claim of the System Committee of the Brotherhood of Railway Clerks that Mary O. Hunt be placed on position of Stenographer as advertised by Bulletin No. 26 October 12, 1938 in office of Chief Engineer and compensated for all wage loss sustained; and

'(b) That Miss Rose Stupasky be removed from position of Stenographer in office of Chief Engineer and her name removed from the seniority roster, and

'(c) That all other employes affected by the illegal assignment of the position of Stenographer to Miss Rose Stupasky be compensated for any and all wage loss sustained.'

"Your attention is directed to that part of your Board's 'Opinion' reading as follows:

'The case should be remanded to the parties to ascertain whether or not in November, 1937 Miss Stupasky complied with the requirements of Rule 18 (e). If she did not, the claim is sustained; if she did, the claim is dismissed. If there is dispute as to the fact, the case may be re-submitted.'

"Upon receipt of your Board's Award 902 the representative of the carrier inquired of Miss Rose Stupasky as to whether or not she had filed with the Division Chairman, in accordance with Rule 18 (e) of Clerk's Agreement No. 6, copy of her letter of November 4, 1937, addressed to Mr. C. W. Johns, Chief Engineer, renewing her name and address.

"Miss Stupasky states emphatically that she did file copy of her letter of November 4, 1937, with the Division Chairman and has furnished the carrier an affidavit to this effect; the original and fourteen copies of this affidavit are attached.

"The representative of the employes, however, does not agree that Miss Stupasky has complied with Rule 18 (e) and in line with your Board's Opinion quoted above, this case is remanded to your Board for a decision as to whether or not Miss Stupasky has complied with Rule 18 (e).

"No oral hearing is desired."

OPINION OF BOARD: A careful examination of the entire record in Award 902—including the Opinion of the Board, the Supplemental Memorandum of the Referee, the Dissent of the Carrier Members, and the authorities cited in these expressions—as well as of all the submissions and arguments presented in connection with the further consideration involved in the instant proceeding, discloses no adequate grounds for disturbing the determinations of that Award, with respect to either the legal significance of the Board's failure to notify Miss Stupasky of the hearing of the dispute, or the findings of the Board on the merits of the dispute. Since the objection that the Board cannot render a proper and lawful award without such notice was overruled in Award 902 (see, also, Award 371 and Award 844), decision must now be rendered on the merits, in light of the findings in that Award and the supplemental record developed herein.

In Award 902 the Board found that "the obligation to mail the Division Chairman a copy of renewals under Rule 18 (e) is mandatory, and if Miss Rose Stupasky failed to do this in November, 1937, she forfeited her seniority rights." By way of elaboration of these findings and the award that accompanied them, it was declared in the Opinion of the Board: "The case should be remanded to the parties to ascertain whether or not in November 1937 Miss Stupasky complied with the requirements of Rule 18 (e). If she did not, the claim is sustained; if she did, the claim is dismissed. If there is dispute as to the fact, the case may be re-submitted."

The case was resubmitted because of dispute as to the fact, but the evidence of record amply supports the conclusion that Miss Stupasky did not comply with the requirements of Rule 18 (e) as interpreted by the Board. While she filed a sworn affidavit that she did so, as well as a copy of her letter of November 4, 1937 to the Chief Engineer which indicates that such copy was sent to the Division Chairman, this evidence is not persuasive. Her affidavit, executed after Award 902 had reduced the issue to the fact here in dispute, is offset by a sworn affidavit to the contrary effect filed by the Division Chairman; and the copy of her letter to the Chief Engineer as submitted by her does not correspond to the copy of the same letter filed by the

carrier in the original proceeding. Of controlling significance, furthermore, is the fact that at no time in the course of the development of the record in the original proceeding was even any assertion made that a copy of Miss Stupasky's letter of November 4, 1937 had been sent to the Division Chairman. It is concluded, therefore, that Miss Stupasky did not comply with the requirements of Rule 18 (e) and thereby forfeited her seniority rights. In these circumstances it must be held that the claim of the Clerks' Organization as originally submitted, and as further supported in this proceeding, is a valid one.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

That the carrier and the employes involved in this dispute are respectively carrier and employes 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 Miss Rose Stupasky did not comply with the requirements of Rule 18 (e) in November 1937 and hence forfeited her seniority rights.

AWARD

Claim sustained, both as originally submitted and as resubmitted in this proceeding.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of July, 1940.

DISSENT TO AWARD 1136, DOCKET CL-932

The dissent in this case deals only with the procedure in denying Miss Stupasky, whom the petitioners sought to deprive of her established seniority, an opportunity to be heard in her own defense.

In this case, as in the cases covered by Awards 844, 902, and 903, the petitioner and respondent carrier waived oral hearing.

The course followed by the carrier members of the Third Division in an effort to secure for Miss Stupasky an opportunity to be heard was the same in this case in all material particulars, including a protest to the National Mediation Board against the appointment of a referee to sit with the Division and make an award in this case, unless and until Miss Stupasky was given notice of hearing, on the grounds that a lawful award could not be rendered without such notice, as indicated by our dissents in the cases covered by Awards 844, 902, and 903.

The procedure in this case is, therefore, wanting in due process for the same reasons stated in the dissent on Awards 844, 902, and 903; hence, the decision on the merits is treated here, as in the dissents on those awards, as being of no effect.

/s/ C. P. DUGAN
/s/ A. H. JONES
/s/ R. F. RAY
/s/ R. H. ALLISON
/s/ C. C. COOK