

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: "(a) Claim of the System Committee of the Brotherhood that the position of Check Clerk, located at Peach Creek, West Virginia, as advertised under Bulletin No. 1958, dated November 7, with hours of assignment from 7:00 A. M. to 3:00 P. M., rate \$4.88 per day, be assigned to Clerk Linsy Ferguson; and

(b) That Clerk Linsy Ferguson be compensated for the difference between the rate he has received of \$4.75 per day and the rate of \$4.88 on the position to which he should have been assigned."

EMPLOYES' STATEMENT OF FACTS: "On November 7, 1939, regular position of Check Clerk, located at Peach Creek, West Virginia, having become vacant, was advertised under Bulletin No. 1958, with hours of assignment from 7:00 A. M. to 3:00 P. M., rate \$4.88 per day. Applications were received as follows:

NAME	SENIORITY DATE	GROUP
Sherman Lilly	11- 1-24	1
Linsy Ferguson	7- 1-39	1
E. J. Ayers	8-30-32	3
J. E. Crites	9-28-37	2

Under date of November 13, 1939, Addendum to Bulletin No. 1958 was issued awarding the position to Clerk Sherman Lilly.

"When Clerk Sherman Lilly filed application with the Superintendent for this position, he did not file a copy of his application with the Division Chairman, as provided on the standard application form for applying for advertised positions as set out in Rule 14. Clerk Linsy Ferguson when filing application with the Superintendent, also filed a copy of his application with the Division Chairman as provided in the said form set out in Rule 14.

"There is in existence an Agreement between the parties, bearing effective date of November 16, 1936, containing among others, the following rules:

'RULE 4—PROMOTION BASIS

'Employes covered by this agreement shall be in line for promotion. Promotion, awarding positions and exercising displacement rights shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

'NOTE: The word "sufficient" is intended to more clearly establish the right of the senior clerk or employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability.'

name and address, in writing, with the proper officer, copy to Division Chairman, and renew same during the month of November of each year. * * *

'Employees failing to protect their seniority rights as provided in this Section (e) and those failing to return to service on the roster from which "cut off" within seven (7) days after being notified by mail or telegram sent to the last address given, unless prevented by sickness or other unavoidable cause or giving satisfactory reason for not doing so, forfeit all seniority rights.'

It will be noted that the above quoted rule provided that employees cut off must file their name and address in writing with the proper officer, copy to Division Chairman. The cut off employee, Miss Rose Stupasky, complied with the Agreement in so far as filing her name and address in writing with the Management was concerned. However, she failed to file a copy with the Division Chairman. Our Management in stating its position before the Board, had the following to say:

'The employees' claim in this case is that an employee who files or renews his name and address in writing with the proper Officer, and who fails to send a copy of such communication to the Division Chairman, loses his seniority rights.'

The Management then quotes Rule 18, Section (b), which requires it to call back cut off employees, after which it made the following statement.

'Miss Stupasky complied with this rule by filing her name and address at the time cut off and renewed same as provided in the rule.'

'It is the Carrier's position that the actual filing of name and address is with the proper Officer of the Railway, and that the provision for sending a copy to the Division Chairman was merely inserted so that a copy would be sent him as information only. The sending of the copy is clearly incidental only.'

OPINION OF THE BOARD: 'The rule has not been construed before. We think that the requirement is mandatory and not directory.'

'This case was sustained in principle, but remanded for the parties to determine a question of fact with regard to whether or not Miss Stupasky filed her name and address with the Carrier, copy to Division Chairman, during the month of November, 1937.'

FINDINGS: '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.'

AWARD

'Claim to be disposed of in accordance with the Opinion.'

'The claim covered by Award 903, Docket CL-983, contained the same principle as that involved in Award 902 and covered a like situation, wherein Mr. Richardson, a cut off employee, had filed his name and address with the Carrier, but failed to file copy thereof with the Division Chairman. The Carrier called him back and placed him on a position, and claim was filed reading:

'(a) Claim of the System Committee of the Brotherhood of Railway Clerks that Andrew H. Anthony be placed on position of Office Boy in office of Chief Engineer and compensated for all wage loss sustained; and

'(b) That the name of John G. Richardson, Jr., be removed from the Chief Engineer's seniority roster; and

'(c) That all other employees be compensated for wage loss sustained.'

"Under the Position of the Carrier, the Management had the following to say:

'On July 5, 1938, Bulletin No. 25 was issued by the Chief Engineer advertising position of office boy; and as no bids were received from employees on that roster senior to Mr. Richardson, and as he was the senior cut-off employee on the Group 2 roster who had protected his seniority in accordance with Rule 18 (e), he was returned to service on the position in accordance with Rules 3 (c) and 18 (c), quoted in Statement of Facts.

'In regard to the employees' claim that failure of an employee to send to the Division Chairman copy of the communication filed with the proper officer showing his name and address constituted loss of seniority under Rule 18 (e) reading:

"Employees 'cut off' * * * must, within 10 working days, (General Office and Accounting Department, Huntington Division, 5 working days) from date actually reduced to the 'cut off' list, file their name and address, in writing, with the proper officer, copy to Division Chairman, and renew same during the month of November of each year. * * *"

it is the Carrier's position that the actual filing of name and address is with the proper officer of the Railway and that the provision of sending a copy to the Division Chairman was merely inserted so that copy would be sent him as information only.'

OPINION OF THE BOARD: 'That the carrier and employee John G. Richardson, Jr., did not comply with the provisions of the current agreement.

AWARD

'Claims (a), (b), and (c) sustained.'

"By reviewing the above reference to Awards 902 and 903, it is significant to note that the Management took the same position in those two cases as that taken in the instant case. Rule 18 (e) provided for filing with the proper officer, copy to Division Chairman. In the instant case, Rule 14 provides for filing with the officer whose name is signed to the bulletin, copy to the Division Chairman.

"We have not attempted to burden the record with all of the argument used by the Carrier in an attempt to defend its position for failure to properly apply the rules in the claims referred to your Board as covered by Awards 902 and 903, as this information is a matter of record in the files of the Board. We feel that we have cited sufficient argument of the Carrier to show that it is attempting to disregard the definite provisions and stipulations provided in Rule 14, the same as it did the expressly stipulated provisions of Rule 18 in the Richardson and Stupasky cases.

"Clerk Sherman Lilly was the senior applicant from the standpoint of seniority. Clerk Linsy Ferguson, in whose behalf this claim was made, stood second from a standpoint of seniority. There is no dispute as to the qualifications of either employee. If Clerk Sherman Lilly had complied with the provisions of Rule 14 by filing a standard application for the position, copy to the Division Chairman, he would have been entitled to the position in preference to Clerk Ferguson. However, as Clerk Lilly did not file a copy with the Division Chairman (which is admitted by him) in so far as being entitled to the position is concerned, he falls in the same category and has the same status as other employees who were entitled to apply for the position

but did not file applications. In other words, there were employes senior to Clerk Lilly who could have applied for the position had they desired to do so, and who would have been awarded the position in preference to Lilly had they filed application as provided in Rule 14, with copy to Division Chairman, due to their having more seniority than Clerk Lilly. However, as they did not file application, naturally they were not entitled to be considered for the vacancy. Likewise as Clerk Lilly did not comply with the rule, he was not entitled to be considered for the vacancy.

"Being unable to reach agreement with the Management, we requested Mr. Parrish to join us in submitting this dispute to your Honorable Board. We submitted to him a Statement of Facts to be jointly certified, and after considering our submission for several weeks, we were advised that the Management could not join us in this Statement of Facts, for the reason that Mr. Parrish had requested the Superintendent to contact Clerk Sherman Lilly and find out whether or not he filed a copy of his application with the Division Chairman, and that he, Mr. Parrish, had a letter from the Superintendent advising that Sherman Lilly claimed to have filed a copy of his application with the Division Chairman.

"We would like to call the attention of your Honorable Board to this fact: That before this case was started, our Division Chairman talked to Clerk Lilly about not filing a copy of his application with him and Clerk Lilly admitted in the presence of two other employes that he did not send a copy of his application to the Division Chairman. This information was given the Management in each conference, and at no time during our handling of this dispute with the Management did it ever take the position that Clerk Lilly had complied with the rule by filing a copy with the Division Chairman, but rather it took the position that the rule did not require a copy to be filed with the Division Chairman. The check-up with Clerk Lilly is an afterthought which occurred to the Management after it had refused to allow our claim and after we had prepared the case for submission to your Board.

"We wish to state most emphatically that Clerk Lilly did not furnish the Division Chairman with a copy of his application. We wish to further emphasize the fact that Clerk Lilly admitted in conversation with our Division Chairman, Clerks G. O. Pennington and R. Q. Burton that he did not send a copy of his application to the Division Chairman. After the Management advised me at the time we were about to exchange briefs that it had a letter to the effect that Sherman Lilly had sent the Division Chairman a copy of his application, I immediately wrote our Division Chairman, informing him of this recent advice received from the Management, and I called his attention to the last paragraph of his letter of January 10, 1940 appealing this claim, which reads:

'For your information, Lilly admitted to me in the presence of others that he did not send me a copy of his application.'

"I suggested that in view of the Management's information that Clerk Sherman Lilly had told the Management that he furnished the Division Chairman a copy of his application, that I would like for him to have the persons who were present when he discussed the matter with Sherman Lilly to sign a statement showing whether or not Lilly did make the admission.

"Under date of May 31, the Division Chairman submitted statement to cover, which is attached as Employes' Exhibit 'F' and hereby made a part of this submission, and for ready reference I quote a part thereof:

'We, the undersigned, were present and heard Sherman Lilly admit to M. H. Smith, Division Chairman of the Brotherhood of Railway Clerks, that he did not furnish the Division Chairman a copy of his application for position of Check Clerk as advertised by Bulletin No. 1958 on November 7, 1939.'

"There have been many cases where the senior employe making application was not awarded the position, (there being no question of qualification)

due to the fact that a position advertised for bids closes at midnight of the last day on which applications are to be received, and any application filed after midnight is not considered. Many examples can be cited to show that employees, regardless of what their seeming intentions might have been, have been denied positions (and rightly so), due to their failure to meet the requirements of the rules.

"As Clerk Linsy Ferguson was the senior applicant for the vacancy who complied with the rules of the Agreement, we most respectfully request your Honorable Board to sustain the claim of the employees."

POSITION OF CARRIER: "The employees claim that Sherman Lilly failed to send to the Division Chairman copy of his application dated November 11, 1939, and by reason of such failure should not have been awarded this position. They further claim that the position should have been awarded to the next senior applicant, Linsy Ferguson, who furnished a copy to the Division Chairman.

"We are attaching as Carrier's Exhibit 'B' copy of letter dated May 13, 1940, from Clerk Sherman Lilly to Assistant Superintendent H. A. Davin, from which you will note Lilly states he did send to the Division Chairman copy of his application dated November 11, 1939, for the position in question. It is the Carrier's position that regardless of whether Sherman Lilly did or did not send a copy of his application for the position in question to the Division Chairman, failure to do so does not forfeit an employee's rights to a position when such employee has made application for the position as provided in Rule 11 and is the senior qualified employee as provided in Rule 4.

"The attention of your Board is directed to that part of Rule 11 reading:

' . . . Employees desiring such positions shall, within five calendar days of date of posting of the bulletin, file their application with the official whose name is signed to the bulletin, and an assignment shall be made within the next five calendar days. . . . '

"You will note particularly that this rule makes no mention of sending copy of such applications to the Division Chairman, on the contrary, it specifically provides that applications will be filed with the official whose name is signed to the bulletin.

"Rule 3 (c) provides that employees on the roster concerned **making applications for positions as provided in Rule 11** will be given prior rights to such positions. Sherman Lilly was senior applicant on the roster on which the position was vacant and made application as provided in Rule 11.

"Rule 4 provides:

'Employees covered by this agreement shall be in line for promotion. Promotion, awarding positions and exercising displacement rights shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

'NOTE: The word "sufficient" is intended to more clearly establish the right of the senior clerk or employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.'

"Under this rule, it is mandatory to award bulletined positions to the senior qualified employee who makes application under Rule 11.

"The only reference to furnishing a copy of an employee's application for a bulletined position to the Division Chairman, is contained on Page 38 of Clerks' Agreement No. 6, showing the STANDARD APPLICATION FORM FOR ADVERTISED POSITION. It is not even required that the standard form of application be used. See Standard Form of Bulletin on Page 34 of the Agreement, providing:

'When standard application forms cannot be secured, the information called for on the form should be furnished in the application.'

"In other words, should an employee desiring to make application for a bulletined position be unable to secure a standard application form, it would merely be necessary for him to make application by letter setting out in such letter the information called for on the application form. The information called for on the form pertains only to the applicant's seniority and previous clerical experience. Therefore, a letter containing such information would be a valid application under Rules 11 and 14.

"The attention of your Board is also called to the fact that Rule 14 also contains standard forms for advertising positions, abolishing positions, changing hours or days of assignment, and bulletin of assignments to positions, all of which carry the notation 'copy to Division Chairman.'

"If the employees' contention in this case is sustained, it will not only mean that failure to send copy of an employee's application to the Division Chairman will void the employee's right under Rules 4 and 11 to a bulletined position, but it will mean that notice must be given with respect to all other forms of bulletins carried in Rule 14; that is to say, if a copy of a bulletin advertising a position was not sent to the Division Chairman and the Local Chairman, the position referred to in the bulletin would not, in fact, be bulletined. This would be true even though a copy was sent to the Division but not sent the Local Chairman or a copy sent the Local Chairman and not sent the Division Chairman. The same would be true with respect to the other bulletins provided for in Rule 14; i. e., a position would not be abolished nor would the assigned hours or days of a position be changed, nor would an assignment of an employee to a bulletined position be effective unless both the Division Chairman and the Local Chairman receive a copy of the bulletin, regardless of the express provisions of the other rules in the agreement, and the particular attention of your Board is directed to the fact that there is no penalty attached to an employee failing to send copy of his application to the Division Chairman, nor is there any penalty attached to failure of the Carrier to furnish copy of bulletins to Division Chairman and Local Chairman.

"The employees' contention in this case is that the blank space provided at the bottom of the standard application form, to be filled in to indicate copy of the form was sent to the Division Chairman, must be filled in, otherwise the application is void irrespective of the plain provisions of Rule 11. Should such contention be valid (and it is not), it would apply equally to the other blank spaces provided on the form. As illustration, the application filed by Linsy Ferguson, the employee on whose behalf this claim is filed, does not contain any information in lines 4 and 5 which pertain to his seniority standing on Huntington Transportation Group 1 roster and on the Huntington District. In addition to this, he showed incorrect seniority date in line 3. The employees' contention in this case would nullify Linsy Ferguson's application in view of the fact that he failed to fill in two lines of the application form and in one case showed his seniority date incorrectly.

"In discussing this case with the employees, they refer to Docket 932 of Third Division National Railroad Adjustment Board, which involved a case of an employee failing to send to the Division Chairman a copy of his letter renewing his name and address when cut off, as provided in Rule 18 (e). There is no similarity in the two cases, as Rule 18 (e) provides a specific penalty for not furnishing copy of renewal of name and address to the Division Chairman. See that part of Rule 18 (e) reading as follows:

'... Employees failing to protect their seniority rights as provided in this Section (e) and those failing to return to service on the roster from which "cut off," within seven (7) days after being notified by mail or telegram sent to the last address given, unless prevented by sickness or other unavoidable cause or giving satisfactory reason for not doing so, forfeit all seniority rights.'

"In the instant case, as set out above, there is no penalty attached to an employe for failure to send copy of his application for a bulletined position to the Division Chairman. On the contrary, Rule 11, covering the procedure in making application for bulletined positions, specifically provides that the application will be filed only with the official whose name is signed to the bulletin.

"In the instant case, Sherman Lilly, as set out in Carrier's Exhibit 'B,' furnished a copy of his application to the Division Chairman. Irrespective of whether he did or did not furnish copy to the Division Chairman, Lilly was the senior qualified applicant and it is the Carrier's Position that he was awarded the position strictly in accordance with Rules 3 (c), 4 and 11 of Clerks' Agreement No. 6 and that the notation on the standard form of application, reading:

'Copy to Division Chairman.'

does not void the provisions of Rules 3 (c), 4 and 11. Consequently, the claim should be denied."

OPINION OF BOARD: The weight of evidence in this dispute discloses that Sherman Lilly, the senior employe bidding on the position advertised by Bulletin No. 1958, failed to comply with the provisions of Rule 14 of the current agreement by his failure to send a copy of his application for the position to the Local Chairman. The evidence further discloses that Linsy Ferguson, who also made application for the position in question, complied with the provisions of Rule 14.

The qualifications of Lilly and Ferguson are not in question.

Under the circumstances, the Carrier erred in awarding the position to Sherman Lilly. Linsy Ferguson should now be permitted to take the position covered by Bulletin No. 1958 of November 7, 1939, and Sherman Lilly should be returned to the position he occupied prior to being assigned to the position in question, unless, as a result of subsequent changes in the force, he is entitled to and desires some other position under schedule rules.

Under the facts and circumstances of this case, the claim for wage loss should be denied.

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 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 Linsy Ferguson shall now be permitted to take the position covered by Bulletin No. 1958, dated November 7, 1939, and Sherman Lilly shall be returned to his former position, unless, as a result of subsequent changes in the force, he is entitled to and desires some other position under schedule rules; and claim for wage loss be denied.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of October, 1940.