Award Number 313
Docket Number TE-202

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers, Southern Pacific Company (Pacific Lines), that employes within the scope of their agreement with the Management, who were paid commissions on shipments of milk, cream, and related commodities handled by express, shall be paid commissions for handling like shipments by baggage."

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As result of a deadlock, Willard E. Hotchkiss was called in as Referee and upon request of the Carrier a second hearing was held on July 1, 1936, at which the parties argued the case before the Division with the Referee sitting as a member thereof.

An agreement bearing date of September 1, 1927, as to rules and August 1, 1932, as to rates of pay is in effect between the parties.

This case involves among other things, the application of Rule 33 (a) of the agreement.

"RULE 33

"*Express and telegraph commissions.*—(a) When express or Western Union commissions are discontinued or created at any office, thereby reducing or increasing the average monthly compensation paid to any position, prompt adjustment of the salary affected will be made conforming to rates paid for similar positions."

The dispute arose in June 1930 in respect to changes which occurred at that time in the transport of milk and related products. The occasion of the claim is the loss of express commissions as result of handling by baggage intrastate traffic in these commodities in Arizona, New Mexico, Oregon, Utah, and California, and interstate traffic in them between Arizona, California, Nevada, New Mexico, Oregon, and Texas, which had previously been handled by the Railway Express Agency, Incorporated.

The dispute was handled in conference and correspondence between the parties. Not being disposed of, it was submitted by The Order of Railroad Telegraphers to the System Adjustment Board. That Board, composed of an equal number of representatives of the respective parties, was unable to agree upon the right of the Board to take jurisdiction. The dispute was then submitted to the United States Board of Mediation, ex parte, by The Order of Railroad Telegraphers, October 28, 1931. It was handled by a mediator for the Board, but was not disposed of.

Exhibit 9 following Committee's rejoinder to Carrier's Rebuttal (Record, p. 94) is a letter from General Chairman N. D. Pritchett to Supervisor of Wage Scales R. E. Beach, dated August 28, 1934, to-wit:

"Please be referred to item covering matter of compensation for handling of milk, cream, and kindred products by baggage by employes

covered by the Telegraphers' current agreement, your file on this subject 50–159.

"The case has been handled up to and including mediation under the Railway Labor Act prior to its amendments on July 21st, 1934.

"Since this Act has been amended, the Chairman of the newly created National Mediation Board has suggested to the President of this Organization that the case be withdrawn from mediation and again handled with the carrier with view of making settlement through agreement in conference and, if this fails, to submit to the National Adjustment Board as the amended Railway Labor Act provides.

"This case has been withdrawn by the President of this Organization and remanded to me for further handling with the Management with a view of reaching a settlement.

"Please list this case for discussion at our next conference."

On October 1, 1934, the Secretary of the National Mediation Board, Mr. George A. Cook, addressed this advice to Mr. J. H. Dyer, Vice President in charge of Operation, Southern Pacific Company (Pacific Lines):

"This Board is in receipt of a letter from the Order of Railroad Telegraphers requesting withdrawal from further consideration of our Board of the grievance disputes between your carrier and that organization covered by our case file Nos. GC–795 and GC–1186, and advising that any further handling given these cases will be in accordance with the Railway Labor Act as amended.

"We are accordingly taking these cases off our open docket."

The record indicates that the subject was handled in conference between the parties on November 5, 1934, and that thereafter Carrier's representative served notice of refusal to give consideration to the claim. (Record, p. 97.)

POSITION OF PETITIONERS.—Petitioners base their claim primarily on Rule 33, which, they point out, was carried over into the current agreement from Decision 757 of the United States Railroad Labor Board. They also cite other decisions of the United States Railroad Labor Board, particularly Decision 2417. In its opinion in that case, the Board said that evidence submitted in numerous cases showed that express commissions have always been a consideration in fixing wages of agents who receive them and then stated that this fact was recognized in promulgating Rule 20 of Decision 757 (Rule 33 (a) of current agreement). The Board then uses this language:

"In this case it appears that the employees received a commission of 10 percent of the express revenue on shipments of milk and cream. The carrier, commencing with April 1, 1921, handled these shipments by baggage, requiring the agents to perform practically the same service in connection with the shipments as was performed while they were handled by express, but discontinued the payment of a commission. This is unquestionably a reduction in the earnings of the agents involved with practically no change in duties.

"*Decision.*—The Railroad Labor Board decides that the payment of a commission on express shipments of milk and cream was a part of the agent's compensation, and that when the practice of handling these shipments by express was discontinued the employees were entitled to an adjustment in compensation. The Railroad Labor Board remands this dispute to the employees and the carrier for conference and negotiation in accordance with the principle established in rule 20 of Decision No. 757."

Petitioners cite in connection with Decision No. 2830 of United States Railroad Labor Board, a letter dated March 19, 1926, addressed by order of the Board, by Secretary L. M. Parker jointly to Vice President Nicholson of the Chicago and Eastern Illinois Railroad Company and President Manion of the O. R. T., to-wit:

"Referring to Mr. Manion's letter of January 26th and Mr. Nicholson's letter of February 12, 1926, in reference to Decision No. 2830 (Docket 3102).

"It was the intention of the Board that any inequalities created as a result of the discontinuance of shipping milk and cream by express should be the subject of negotiation under rule reading:

"'Should commissions be discontinued causing loss in compensation, adjustment in salaries will be made.'

and in the event agreement could not be reached the matter should be resubmitted to this Board in accordance with the Transportation Act, 1920. It is suggested that the matter be handled accordingly."

Petitioners contend that carrier reached an agreement with the Railway Express Agency, Inc., whereby the latter abandoned handling the commodities involved in this dispute in favor of the carrier.

In support of this contention petitioners point out that the Express Agency instructed its agents (in many cases joint agents with the Southern Pacific Company) to decline shipments of milk and cream and refer shippers to baggage department of the carrier. As proof of this, petitioners quote from Circular 18, issued Los Angeles, May 31, 1930, by Superintendent M. Thompson, of the Railway Express Agency, Inc. The quotation contains this language:

"Southern Pacific Company has arranged to carry less carload cream, milk, etc., between stations local to their line—Pacific System—on interstate traffic beginning June 1st, 1930, and on intrastate traffic in California beginning June 16th, 1930. * * *

"On and after dates mentioned in the first paragraph of this circular, if any of this traffic is offered us between local stations on the Southern Pacific Company (Pacific Lines) the shipper should be referred to the Baggage Department of the rail line."

Petitioners also quote circular dated Sacramento, May 19, 1930, issued by Superintendent E. E. McMichael of the Railway Express Agency, Inc., which is somewhat more explicit, but to the same effect as Circular issued by Superintendent Thompson.

In further support of their contention, petitioners point out that the Southern Pacific Company (Pacific Lines) issued formal instruction to their agents (in many cases joint agents with the Railway Express Company, Inc.) to the same effect as instructions issued by the Railway Express Agency, Inc., and they quote circular addressed to agent, Pacific Lines, Train Baggage men on trains, Pacific Lines, from C. J. McDonald, Mail and Express Traffic Manager, and dated San Francisco, May 23, 1930, and circular issued by O. F. Giffin, Auditor of Passenger Accounts, addressed to all ticket and baggage agents, dated San Francisco, May 5, 1930, as proof. Contents of those quotations are substantially the same as circulars of the Railway Express Agency, Inc., which were quoted.

Petitioners contend that circulars they have quoted establish an agreement to substitute the service of the Southern Pacific Company for the service of the Railway Express Agency, Inc., in handling milk and cream and related commodities for all shipments except milk and cream in bottles which they say are infinitesimal.

Resting their legal rights upon Rule 33 (a) and the decisions and interpretations by the United States Railroad Labor Board as above cited, petitioners further develop the factual basis of their claim as follows:

"Prior to the effective date designated in the Statement of Facts covering this case, the handling of milk, cream, and related commodities by the Railway Express Agency had been a regular procedure over an extended period of years and for the services performed in connection with the handling of these commodities the employes received compensation. After the change in the method of handling from express to baggage, the employes are still performing the duties and bearing the responsibilities, but with a loss in compensation.

"In arriving at a proper rate of pay for the positions covered by the Telegraphers' Agreement on this property, the amount of express commission received has been taken into consideration. This has been the custom since the establishment of contractual relationship between the management of the Southern Pacific Company and employes represented by The Order of Railroad Telegraphers.

"Incorporated in that express commission heretofore there has been figured the commissions accruing because of the handling of the commodities mentioned in our Statement of Facts on this case. With the removal of the commodities designated in our Statement of Facts, the loss

in compensation to the employes should be taken care of by an adjustment upon a commission basis, and the justice of our position on this question has been recognized by an impartial tribunal, the United States Railroad Labor Board, as set forth elsewhere in this brief."

Petitioners then cite practice on other Western railroads developed by questioning representatives of employees on 22 railroads. They submit that replies to their inquiry show that where baggage service has been substituted for express service for the commodities involved in this case, commissions are being paid for handling them on the following 14 roads: Atlantic Lines of the Southern Pacific; Kansas City Southern; Union Pacific; M. K. & T.; Missouri Pacific Lines in Texas; Missouri Pacific; St. Louis & San Francisco; Chicago, Rock Island & Pacific; Colorado & Southern; Los Angeles & Salt Lake; Oregon, Washington Railroad & Navigation Company; Oregon Short Line; Denver & Rio Grande, and Western Pacific. Petitioners point out that 11 of the above lines have a rule identical to Rule 33 (a), one has a slightly different rule, and two have no rule at all. They also submit that in each of the above cases the change from express service to baggage service was made subsequent to Decision 757 of the United States Railroad Labor Board, and that adjustment was made in accord with the intent of the rule as defined by the Board.

Further, petitioners submit that on the Soo Line to which Decision 2417, above mentioned, pertained, the question was settled in conference by carrier paying commissions. Petitioners say that the issue of commissions was settled on the Northern Pacific and Great Northern prior to Decision 757 by payment of a lump sum distributed by mutual agreement; on the C. & N. W. in 1906, when the method of handling the commodities was changed, by adding $5.00 per month in lieu of commissions, and that on the Great Western, the Burlington, and the Milwaukee roads these commodities have not been handled by express since employees were organized and no rules have been involved and no controversies have arisen. They say that on the A. T. & S. F. Lines all commissions were discontinued prior to organization of employees, and prior to Decision 757 and converted into a wage increase of about 5¼%. On the S. P. & S. petitioners understand that a dispute similar to this one is pending.

Petitioners submit that the above facts indicate:

"* * * that where this controversy has arisen subsequent to the organization of employes, by far the greater preponderance of Carriers have recognized the justice of the stand taken by the Employes and in settlement of this question are paying their agents commission for the handling of milk, cream, and related commodities by baggage."

Summing up their view of the essence of the transaction by which the shipment of the commodities in question was transferred from Express to baggage, petitioners use this language:

"Prior to the effective date mentioned in the Statement of Facts, the revenue received through the handling of the commodities referred to herein was collected by and in the name of the Railway Express Agency, Inc., and made a part of the common sum, from which all Carriers in a set territory received an allocation at stated periods. The sum of money placed in the common sum was, of course, less the commissions paid the joint agent for handling the business.

"After the effective date named in the Statement of Facts, the revenue received from shipments of milk and cream accrued solely to the Southern Pacific Company. It was not placed in a common sum for other Carriers to share in. The Carrier absorbed the commissions formerly paid to the employes of the Carrier who acted as joint agent with the Carrier and the Railway Express Agency, Inc."

Subsequent briefs filed by petitioners in response to carrier's briefs and material and argument used in hearings develop further the petitioners' position on numerous factual and jurisdictional contentions, but petitioners' case rests essentially on the facts, statements, and citations above outlined.

POSITION OF THE CARRIER.—Carrier challenges the claim, first, on the ground that this Board has no right to take jurisdiction, and second, on its merits. The nature of the controversy makes it impractical to disentangle its jurisdictional and its factual aspects except on the basis of a complete statement of the carrier's case.

Carrier places great emphasis on the contention that carrying the products involved in this case by passenger trains is not an innovation, but has been done for 36 years and that agents have never received commissions for handling these products as railroad business. During this time the carrier points out the railroad company and the Express Company operating over carrier's lines have been competitors for the business and it has been optional with the shipper whether he used express service or the railroad service to points on the carrier's lines and a few interline points. It was further pointed out that from 1908 to 1921 carrier operated passenger milk train between San Francisco and San Jose, and between Oakland and San Jose, and that during these 13 years employees under telegraphers' agreement received no commissions, nor were they allowed additional compensation. Carrier stresses the point that it has always zealously reserved to itself the right to handle the products involved in this case, and that it was actively engaged in handling them from 1899 to 1921.

Carrier also submits that during all that time the Express Company handled a substantial volume of said business on the passenger trains of the carrier. The carrier explains that during the period from 1916 to 1922 both the carrier and the Express Company lost a considerable part of the business to motor trucks, with the result that it became unprofitable for the carrier actively to solicit the business, as it could not compete with the door to door pick-up and delivery service of trucks. A further result was that from 1922 to 1930 carrier handled very little of the business in question, though it continued to publish commodity rates for it.

In Section 8 of carrier's brief the argument is developed that though the substance of Rule 33 was contained on all telegraphers' agreements, beginning with November 1, 1902, carrier has never contracted to make any adjustment unless commissions are entirely discontinued. Carrier then stresses the inevitable fluctuation in the amount of commissions earned by agents both on the commodities involved in this case and other commodities.

Numbered Section 9 of carrier's original brief contains carrier's interpretation of the claim. Inasmuch as this interpretation has important bearing on both the jurisdictional and the merit phases of the controversy, it is quoted in full, to-wit:

> "The Carrier understands the claim, as reflected by the ex parte submission, is for recovery of an amount alleged to have been lost by employes as a result of the Carrier regaining business which it previously lost to either the Express Company or the motor trucks, also on new business acquired, irrespective of whether such new business was at any previous date handled by the Express Company. The Carrier further understands that the claim is for payment of commissions on milk and cream and related products hereinafter handled by the Carrier, irrespective of whether the stations involved, at any time in the past, have received commissions on such business when it may have been handled as an express shipment. If the claim is as herein described and understood by the Carrier, it demonstrates beyond any doubt that the claim is, in effect, a request for a new rule, a change in rate of pay, likewise a change in working conditions, without compliance with Section 6 of the Railway Labor Act on the part of the Order of Railroad Telegraphers, and that it is a request which cannot be legally granted under Section 3 of the Railway Labor Act as amended June 21, 1934. We submit the following facts as conclusive proof that the Order of Railroad Telegraphers are requesting a new rule and a change in working conditions, to-wit:
>
> "Prior to June 1930 milk, cream, and related products were shipped to and/or from approximately 450 stations on the Carrier's lines; at approximately 25 per cent, one fourth, or 114 of said stations, the Express Company maintained separate agencies, that is, the railroad (Carrier's) agent was not joint agent for the Express Company, and, therefore, said railroad (Carrier's) agent, did not receive commissions on said business; but notwithstanding, the Order of Railroad Telegraphers claim that said agent should now receive commissions on the business and should be compensated in the amount lost, nevertheless and notwithstanding said agents could not lose that which they never had.
>
> "Carrying the above illustration a step further: As of February 1935, milk, cream, and related products were shipped as a railroad commodity

to and/or from 124 stations on the Carrier's line; at 93, or 42 per cent of those stations, the Express Company maintains a separate agency; consequently the railroad agent is not joint agent and, therefore, did not prior to June 1930 receive any commission on such of the milk, cream, and related products as were handled to and from his station, either as an Express Company or railroad company (Carrier) commodity; nevertheless, the Petitioner requests this Board to compensate said agents for an alleged loss that they did not sustain and regardless of the fact that the agent did not have anything to lose; and beyond that the Petitioner requests this Board to allow not only the agents specifically referred to but all other agents a commission on railroad business, which is not provided for in the Telegraphers' current Agreement, and which has never at any time heretofore been paid when the business has been handled as a railroad commodity."

Numbered section (10) of carrier's original brief is a summary of carrier's grounds for asking that the claim be denied, to-wit:

"1. That the claim is, in effect, a request for a change in rates of pay, rules, and working conditions, and therefore, Section 3 of the Railway Labor Act, as amended June 21, 1934, is not applicable.

"2. That the National Railroad Adjustment Board, Third Division, cannot legally assume jurisdiction of the dispute.

"3. That the Petitioner has not complied with Section 6 of the Railway Labor Act as amended June 21, 1934.

"4. That the Carrier has not contracted with the Order of Railroad Telegraphers to pay any commissions on any business of either the Carrier and/or any other companies or corporations which its employes may serve.

"5. That there is no rule of the Telegraphers' current Agreement which requires the Carrier to pay commissions to employees working under that Agreement.

"6. That no rule of the Telegraphers' current Agreement has been violated.

"7. That no rule of the Telegraphers' current Agreement is involved in this dispute.

"8. That under 31 years' practice, that is, from 1899 to 1930, employes within the scope of the Telegraphers' Agreement handled milk and cream as a railroad commodity, and were not paid, neither did they claim commissions, nor additional compensation therefor."

Carrier's subsequent briefs and arguments in answer to petitioners' arguments go into further details in reference to some of the points at issue and submit some supplementary materials, including a list of eastern roads where practice corresponds to that on Carrier's lines. However, the Carrier's case is substantially as above stated.

DOCUMENTATION AND CHECKING.—The submissions of both the petitioners and the carrier are extensively documented. Exhibits on both sides have been accepted as presented. Aside from documentary material, some of the statements made by each side are contradicted or questioned by the other side. It was not deemed necessary to check or reconcile all conflicting statements, inasmuch as the documents available were considered sufficient to establish the merits of the respective contentions by the parties.

OPINION OF REFEREE.—*Jurisdictional Issue.*—In numbered section (1) of carrier's brief, jurisdiction of this Board over claim is challenged on the following grounds:

A. It is a request for a change in agreement affecting rates of pay, rules, and working conditions.

B. It is a request for payment of commissions to Agents and/or Agent Telegraphers, employed by the Southern Pacific Company (Pacific Lines) for handling Southern Pacific shipments.

C. Rates of pay for employees coming within the scope of the Telegraphers' current agreement were established by U. S. Government Mediation Agreement effective May 1, 1927, and are maintained in accordance with same except where since changed in accordance with provisions of said agreement and/or by mutual agreement; therefore Section 3 of the Railway Labor Act as amended June 21, 1934 is not applicable and Section 6 of the same act has not been complied with.

These contentions appear to be related to, if not based on, carrier's interpretation of the claim as set forth in numbered section (9) of carrier's brief,

above quoted. While this interpretation of the claim is not necessarily crucial in respect to the jurisdictional issue, it is at least worthy of note because it gives the claim an extraordinary sweeping character.

First in the list of jurisdictional arguments advanced by the carrier is the contention that the claim is a request for a change in the agreement affecting rates of pay, rules, and working conditions. In the judgment of the Referee, the issue upon this point is not primarily jurisdictional but factual. In other words, the crux of the dispute is whether in fact the carrier has wrongfully changed the basis of commissions upon which the rates of pay in the agreement were predicated, and which under applicable rules and decisions would entitle petitioners to redress. Petitioners claim that this has been done and that they are entitled to redress. Carrier claims that petitioners are in error as to their claim and therefore entitled to no redress.

No way appears by which this Board can deal with that kind of factual issue without taking jurisdiction of a case (Cf. opinion on carrier's jurisdictional objection 4 Award 292, Docket CL–238).

The Carrier's second objection to the Board taking jurisdiction, namely, that the claim is a request for the payment of commission to agents for handling the Carrier's shipments, appears to be merely a more specific way of stating the first objection and, as such, is subject to the same line of reasoning applied to objection one.

The third ground on which jurisdiction is challenged, insofar as it assumes that the claim is a request for change in rates of pay, is subject to the same qualifications as objections one and two. Together with this assumption the objection embodies the carrier's interpretation of presumably pertinent sections of the Amended Railway Labor Act. Parties appearing before this Board are fully within their rights in urging any interpretations of laws and rules which they deem applicable to a particular case. But, of course, it rests with the Board to make the decision as to whether interpretations advanced by parties are or are not sound.

Apropos of decisions by the United States Railroad Labor Board cited by petitioners, argument in behalf of carrier was advanced that, inasmuch as giving petitioners redress claimed would involve changing rates of pay, arguments drawn from these decisions are not applicable, since that Board had jurisdiction to change rates of pay which this Board lacks. This argument, in the opinion of the referee, begs the question. since the issue in the instant case is precisely whether the claim is a request for a change in rates of pay or a claim for redress because of misinterpretation and misapplication of an agreement.

Original argument of this case was heard by the Third Division on October 31, 1935. On November 5, 1935, the Division handed down Award 119, Docket CL 135, in Appendix A, of which Referee Samuell rendered an opinion supporting refusal of the Division to take jurisdiction in that case. Referring to Awards in TD–55, 56, and 57 and CL–63, Referee Samuell used this language:

> "I held in the cases above referred to that the 'Mediation Board should take over all cases referred to the Board of Mediation which remain unsettled, while the Adjustment Board shall take over and settle those cases which are pending and unadjusted on the date of the approval of the Act.' The word 'shall' was used advisedly and in the compulsory sense. To hold that this Board and the Mediation Board have concurrent jurisdiction in this case would open the door to perplexities and confusion which could not be unravelled. With all due deference to the recommendations or suggestions of the Mediation Board, I am of the firm conviction that the recommendation of withdrawal of the case from its jurisdiction was inadvisable. In order to enforce its rights the Petitioner should have insisted that the Mediation Board proceed, and in the event of advice from that Board that all practical remedies had been exhausted in an effort to adjust the difference without effecting a settlement, then, in my opinion, this Board could have assumed jurisdiction, supporting its authority on the hypothesis that the case was still pending and unadjusted. It follows, therefore, that this case or dispute should be dismissed for want of jurisdiction."

The circumstance as to withdrawal of the case from mediation was, it seems, practically identical in Award 119 and the instant case. However ,the specific circumstance upon which the language of the opinion supporting Award 119

shows it to be based is interwoven in the instant case with other factors which, in the judgment of the referee, should be considered.

Considering the jurisdictional issue in its entirety, the Referee is impressed with the fact that the Amended Railway Labor Act is an outgrowth of legislation and public policy which have been evolving for more than a generation, and it applies to relationships which have undergone a similar process of evolution. The obvious purpose of the Act, as of its predecessor acts, is to promote and facilitate effective and reasonable adjustment of disputes and causes of disputes on American Railways. To that end machinery has been finally set up in which are included the Mediation Board and the National Railroad Adjustment Board.

The Mediation Board may be utilized, under the conditions and procedures prescribed, for dealing with questions involving changes in agreements in respect to rates of pay and working conditions. The National Railroad Adjustment *Board has jurisdiction over questions which involve interpretation and applica*tion of agreements. Careful study of the Act indicates that neither Board has any general power to pass on the jurisdiction of the other Board. In Award 119, by using the word "inadvisable" instead of a stronger word to characterize the action of the Mediation Board in recommending withdrawal from that Board of the case to which Award 119 pertained, Referee Samuell avoided any jurisdictional issue between the two Boards. In border line cases which come before this Board it is for the Board to determine whether a case is within its jurisdiction. Aside from cases pending before the Board of Mediation when the amended Railway Labor Act became effective, the Mediation Board is presumably free to judge whether a case brought before it is one which it should handle or one which should be referred to this Board, always with the possibility that this Board may decline jurisdiction.

The instant case, like the case to which Award 119 pertained, was before the Board of Mediation when the amended Railway Labor Act became effective. The language of the opinion in Award 119 appears to mean that the Mediation Board should have exhausted all practical remedies before turning the case back as pending and unadjusted. In respect to the instant case, it would be helpful to know whether the Mediation Board turned the case back as one *in which its practical remedies had been exhausted or as a case considered to* involve an interpretation or application of an agreement.

The reasoning by which eminent legal talent has held that the jurisdiction of the two Boards is exclusive and not concurrent, and that cases before the Board of Mediation when the amended Railway Labor Act became effective should be handled to a conclusion by the Mediation Board, appears to rest on sound logic. However, the fact remains that this Board now has before it a debated question as to whether on the one hand the claim amounts to a request for a change in rules, rates of pay, and working conditions, or whether on the other hand it is a claim for redress because of misinterpretation and misapplication of an agreement. Either type of case could be handled by the old Board of Mediation, where the instant case reposed when the amended Railway Labor Act became effective. The new Mediation Board, on the other hand, except for clearing its calendar as the law prescribed, deals only with cases which involve changes in agreements, while this Board deals with cases which involve interpretation and application of agreements. The crucial issue in the instant case is precisely the question what kind of a case it is, and the only way to avoid stalemate and futility is for one Board or the other to handle it. As a matter of reason and common sense, it cannot conceivably *advance the purposes for which the Amended Railway Labor Act of June 21*, 1934, was enacted to leave that question hanging in midair.

Mindful of the fact that the issue in the instant case calls for a decision; that the National Railroad Adjustment Board has power to decide issues, that the Mediation Board has deliberately relinquished jurisdiction, that disagreement in judicial bodies is not an unusual phenomenon, that decisions of such bodies are frequently modified by later decisions, the Referee, notwithstanding Award 119, holds that this Division should take jurisdiction and decide whether the instant case involves a claim based upon a misinterpretation and misapplication of the agreement or a claim which amounts to a request for change in rates of pay and working conditions.

OPINION ON MERITS.—In awards 297 and 298, Dockets TE–271 and TE–247, the relation between commissions paid by the Railway Express Agency, Inc., and wages paid to agents by a particular railway was considered at length.

In Award 298 this language was used:

"* * * the practice by which railway agents are paid commissions for services performed for companies other than their principal employer, the particular railroad company, is sufficiently general to be regarded as part and parcel of the system under which industrial relations on American railways are conducted. The recipient of commissions under such a system is in an entirely different status, both as regards his primary employer, the railway company, and as regards his secondary employer, in this case the Railway Express Agency, Inc., from a person who has occasional or fortuitous opportunity to increase his regular wages by supplementary earnings.

"From whatever point of view regarded, the relationship between any given Railway, The Railway Express Agency, Inc., and the joint agent who works on that railway, *is a triangle no side of which can be removed* or weakened without considering what the result will be to the other two sides."

* * * * *

"The Referee finds, therefore, in this, as in any other case in which express commissions were considered in establishing the wage scale for agents on any railway, an obligation exists either to maintain the rate of commissions intact or adjust the wage scale to compensate for changes in the rate of commissions until such time as the wage rates or the commissions, or both, are changed in accordance with Section 6 of the Amended Railway Labor Act."

* * * * *

"In considering the essence of these triangular relationships, the Referee cannot fail to note the close connection between the railways of the United States and the Railway Express Agency, Inc. Although the Express agency is a separate corporation, it is owned and controlled by the carriers over whose lines express business is carried. Ambiguity concerning the status of employees who serve both the railways and the Railway Express Agency, Inc., and whose total compensation is made up of regular wages—hourly, daily, or monthly, as the case may be—paid by the railway, and of commissions paid by the Railway Express Agency, Inc., must inevitably make for confusion and discord instead of the prompt and orderly settlement of disputes which it was the purpose of the Amended Railway Labor Act, and substantially of earlier legislation, to promote."

The opinion of the Referee in Award 297 contains this language:

"* * * the railway company and the Railway Express Agency, Inc., jointly have undertaken to revise commissions in a manner which *constitutes in essence denial on the part of both the railway and the Express* Agency of contractual obligation to the agents concerned, for the maintenance of the rate of commissions which obtained before the revisions were made."

* * * * *

"* * * there is ample precedent to establish the obligation either to continue paying commissions when such commissions were in force at the time wage schedules were adopted, or to adjust wage schedules when payment of commissions ceases. However, in response to citation of cases which have enforced this obligation, argument is advanced that no such obligation exists when merely the amount of commissions is altered. In support of this position, it is argued that express commissions vary widely from month to month, season to season, and from year to year and that such variations greatly affect the total compensation of the railway *employees involved. In further support of this view, it is pointed out that* the 'wage fabric' of these employees is subject to change, and when such changes occur either one of the parties desiring the change in wage rates must serve notice of this desire and call for conference.

"The Referee is of the opinion that normal fluctuations in commissions, due to factors other than the *willful* acts of either the railway or the Express Agency, must stand in quite a different light from fluctuations occasioned by a definite change in the basis upon which express commissions are figured. It would appear to be a highly technical argument that abolition of commissions which is the equivalent of a reduction of 100 per cent would require a revision of the wage rates; whereas, a reduction of

ninety per cent, seventy-five per cent, fifty per cent, or any other material amount would not require such revision."

* * * * *

"As long as a railway company or the Railway Express Agency, Inc., is in a position to shift responsibilities back and forth, the purposes of the Amended Railway Labor Act in respect to this three-cornered relationship are bound to be impeded."

* * * * * * *

"The railways of the country and the Railway Express Agency, Inc., are both covered by this law. There can be no doubt that Congress intended that employer-employee relationships involving express business, as well as relationships involving railway business direct, should be amicably, efficiently, and promptly adjusted under the provisions of the law."

* * * * * * *

"The salient fact is that express commissions are inextricably interwoven with the wages which the Railway contracts to pay agents. It must, therefore, be held especially in view of the close property relationships between the railways and the Railway Express Agency, Inc., that the Railway by which an agent is primarily employed and the Railway Express Agency, Inc., by which he is secondarily employed, are jointly and severally obligated to maintain the wage structure of agreements, insofar as express commissions are found to be an essential factor in determining the wages to be paid by the railway. In the judgment of the Referee, this ruling would be sound even though the railways and the Railway Express Agency, Inc., were not in these corporate relationships as closely interwoven as they are. With them so interwoven, such a realistic approach becomes inescapable."

In Award 297, as above noted, it was held "that normal fluctuations in commissions due to factors other than the willful acts of either the railway or the Express Agency must stand in quite a different light from fluctuations occasioned by a definite change in the basis upon which express commissions are figured."

In the instant case there has been no change in the basis upon which express commissions are figured as regards the rate of those commissions, but the reasonable conclusion to be drawn from the record as documented is that the railway and the express agency have reached a meeting of minds as to an act, the result of which must inevitably be to reduce the amount of traffic upon which commissions are paid by switching traffic from the category of express business which pays commissions to the category of baggage which pays no commissions.

The word "wilful" as used in Award 297 carries no implication other than that the act was done on purpose in order to reduce the burden of commission payments. In the instant case, it is clear that similarly the act was done on purpose for the same object.

When a triangular arrangement is entered into by which agents accept a certain basis of compensation for work performed for a railway company in contemplation of receiving in addition commissions at a given rate on express business, he naturally assumes the risks involved in fluctuations from seasonal, cyclical, industrial, climatic, and other natural and impersonal causes over which none of the parties to the three cornered arrangement has control. When, however, one or two of the three parties takes deliberate action the inevitable effect of which must be to impair the benefits that constituted the consideration upon which the contract was based, then clearly the party whose benefits are impaired is entitled to redress.

Rule 33 supplies complete proof that express commissions constituted one of the considerations in the agreement of September 1, 1927, between this carrier and The Order of Railroad Telegraphers. By its specific terms the agreement obligates the carrier to make good, to the agents covered, loss suffered as result of commissions being discontinued. In all reason and equity the agreement by necessary implication likewise obligates the carrier to make good to agents loss resulting from actions which carrier takes or participates in, the natural and inevitable result of which must be to impair the benefits to agents (wages plus commissions) which constituted the consideration upon which the contract was based.

The fact that the above line of reasoning leads to the same conclusions reached by the United States Railroad Labor Board gives it the support of precedent. The fact that the principles laid down are in accord with the practice of many carriers fortifies those principles as embodying a realistic approach to a definite operating problem.

Pursuant to the principles herein and previously laid down, the Third Division finds that petitioners are entitled to redress for whatever loss of commissions is attributable to the action of the carrier and the Railway Express Agency, Inc., in shifting traffic in the commodities involved in this case from express to baggage.

Specifically the claim is that employees within the scope of the agreement "shall be paid commissions for handling like shipments by baggage." The record appears to be silent concerning the amount of the loss attributable to the joint action of the carrier and the Railway Express Agency of which complaint is made. In this connection, reference was made above to the sweeping nature of the complaint as interpreted by the carrier. Although the language of the claim may be susceptible of such interpretation, the Referee holds the claim to be one for redress for loss suffered because of misinterpretation and misapplication of the agreement. That is the redress to which petitioners are entitled under this ruling.

Neither the agreement nor the interpretation of the agreement by the United States Railroad Labor Board specifies the form which adjustment for loss of commissions shall take. Moreover, it cannot be held that either the rule or the interpretation contemplate any change in the compensation of agents who suffer loss through changes in commissions due to action of carrier other than that specified in the agreement. What the agreement specifies is that "prompt adjustment of the salary affected will be made conforming to rates paid for similar positions." From the practice of other carriers, as cited by petitioners, it appears that adjustments to compensate agents on account of loss suffered by shifting traffic in the commodities involved in this case from express to baggage has taken several different forms.

In these circumstances the Referee is of the opinion that the correct procedure for further handling of the instant case is indicated in the letter of March 19, 1926, quoted above, which Mr. Parker, Secretary of the United States Railroad Labor Board, sent, by order of the Board jointly to Mr. Manion, President of The Order of Railroad Telegraphers, and Mr. Nicholson, Vice President of the Chicago and Eastern Illinois Railroad Company.

AWARD

1. This claim involves an interpretation and application of Rule 33 (a) of the current agreement between the carrier and The Order of Railroad Telegraphers and is within the jurisdiction of this Board.

2. Rule 33 (a) by its language and necessary implication supported by authoritative decision and precedent entitle agents covered by the agreement and affected by the acts complained of to demand that a "prompt adjustment of the salary affected will be made conforming to rates paid for similar positions."

3. Defect in the form of the claim in that it erroneously stipulates that the employees involved "shall be paid commissions for handling like shipments by baggage," is not material and does not impair the right of the employees in question to compensation for loss suffered since June 1, 1930, and in the future on account of the action of the carrier and the Railway Express Agency, Inc., in shifting shipments of the commodities involved in the case from express to baggage, which right is hereby confirmed.

4. Rule 33 (a) does not specify the form in which "adjustment of the salary affected will be made," but merely specifies that it shall conform "to rates paid for similar positions." The form of adjustment in the first instance is a matter of negotiation, and if possible of agreement between the parties.

5. The record does not contain the information requisite to determine the extent of the loss suffered. This item is likewise in the first instance, a matter of conference between the parties with all necessary records made mutually available.

6. In order to determine the amount of adjustment retroactive to June 1, 1930, to which the employees involved are entitled, and the form it shall take, the case

is remanded to the parties for negotiation and, if possible, agreement in accordance with the provisions of this award.

7. In the event that agreement cannot be reached, the parties or either of them may resubmit issues which remain in dispute to this Board for decision.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 8th day of October, 1936.