Award Number 315
Docket Number TE–313

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Robert G. Corwin, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers on the Nashville, Chattanooga, and St. Louis Railway, that the monthly guarantee paid the joint agent at Stevenson, Alabama, for handling the business of the Railway Express Agency originating and destined his station and for handling the transfer of express business of the Railway Express Agency from the Nashville, Chattanooga, and St. Louis Railway to the Southern Railway at that point, which guarantee was arbitrarily reduced from $25.00 to $7.50 a month March 1st, 1933, be restored retroactively to that date and the incumbent, W. E. Barry, reimbursed for the monetary loss sustained by him through this reduction."

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

The carrier and the employee involved in this dispute are respectively carrier and employee 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 a result of a deadlock, Robert G. Corwin was appointed as Referee to sit with the Division as a member thereof.

W. E. Barry was appointed joint agent of the Nashville, Chattanooga & St. Louis and the Southern Railways at Stevenson, Alabama, July 15, 1930, displacing the former occupant of that position. The rate per hour paid him under the wage scale of the former carrier effective January 1, 1926, was 72 cents. In addition to this compensation he was paid commissions of 10 percent for handling express shipments by the Southeastern Express Company and Railway Express Agency. His claim against the N. C. & St. L. Railway is for a difference between the commissions actually paid him after March 1, 1933, by the latter Agency and a minimum guarantee of $25.00 a month, which he says existed at the time of his appointment.

In 1909 a ticket clerk named Potts was employed at Stevenson by the Southern Express Company to handle and transfer its express with a guarantee that the minimum commissions which he was to receive would not be less than $25 a month. In April 1917 the express company established a general minimum guaranteed commission of $7.50 a month where railroad agents also served as express agents. The transfer of the express was abolished in 1921, but Potts continued to receive his allowance until November 20, 1924, when the work was turned over to the Railway Station Agent. In the meantime Southern Express Company had been taken over and operated, for a time, by the United States Railroad Administration and had later become the American Railway Express Company. Successive agents, the claimant being the last, have continued to handle the express and there is no evidence that the minimum rate was ever changed. In the absence thereof we must assume that when the work was transferred from the clerk to the agent it carried with it all the terms and conditions upon which it had been previously performed.

It is stated that after 1924, for some time at least, the monthly commissions exceeded $25. During four months in 1928 and 1930 the carrier claims that

the then agent doing it was paid and accepted less. This alone, of course, could not have the effect of changing the rate. When Barry was appointed it is not shown that he knew of a $25 minimum. In fact, he remitted his collections in August after his appointment in July without deducting such a minimum, the commissions amounting to less. The Railway Express Agency, which had then succeeded the former Express Company, sent him a credit memorandum and its check notifying him that he should observe a $25.00 minimum. In the absence of any evidence on the part of the carrier to the contrary, except failure of Dillingham to collect, we think that this fact is sufficient to show that no reduction had been negotiated by the agents or their representatives and the Railway and the Agency. This conclusion is further strengthened by the conduct of the Agency in 1933. After asking the railway if it had any objection to the Agency's securing a reduction, the latter sent a representative to Barry to see if he would agree to it. It only obtained his refusal and a request to take the matter up with the Chairman of the Order of Railroad Telegraphers. This the officer of the Express Agency agreed to do, but nothing was heard from him or the Agency until Barry received a letter from the Superintendent of the Agency advising him that his "minimum allowance of $25 for handling express at Stevenson, Alabama, will be reduced to $7.50 per month."

The Agency now claims that there was an error in paying the allowance. Its acts certainly would not indicate it. If a reduction in the rate of pay had been lawfully negotiated the Agency and the Railway would certainly have known of it and be able to tender some proof to support that position. While Barry was not advised of the extent of the guarantee he is entitled to whatever it was.

Under the former awards of this Division relied upon by the employees, the N. C. & St. L. Railway must protect Barry from any loss until the rate is readjusted by agreement. If the Agency had kept its promise to settle the matter with Barry's representatives, the case would not now be before us. While some rearrangement should possibly have been made, it was up to the Agency to secure it in the proper way, and this it failed to do. We can only conclude that an established rate was changed in violation of the terms of the employees' contract and that the Railway must collect from the Agency and reimburse Barry for any loss he has suffered in not maintaining the established guarantee formerly observed.

AWARD

The N. C. & St. L. Railway shall recover the amount of the claim from Railway Express Agency for the benefit of claimant, or pay the same to him.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 12th day of October, 1936.

DISSENT

Award 315 Docket TE–313

I dissent from the award in this case on the following grounds:

1. That the findings do not support the award.

2. That the findings are in many respects erroneous and are principally devoted to an ex parte conviction of the Railway Express Agency, not a party to the case and not heard as to the accusations forming the bases for its castigation, by the Referee.

3. That the findings largely ignore the record in the case and in the last analysis the award is made to rest upon former awards of this division involving other railways under conditions and rules not present in the instant case.

4. The award is not responsive to the claim; it extends beyond the scope of the claim and seeks through the respondent railway to punish the Railway Express Agency, not a party to the case and not afforded an opportunity to be heard in its defense.

The findings do not support the award in that they fail to show any reason why the respondent railway should be called upon to act as a collecting agency for the claimant and, upon the failure of that effort, shall itself suffer penalty in the amount it fails to collect. No rule or rules are cited to show that such a requirement is justly imposed or that the railway had any duty to protect the agent against the reduction of a guarantee, if such a guarantee was in effect and if such a reduction was in fact made. On the contrary, the findings state that in April 1917 the Express Company established a monthly commission guarantee of $7.50 *where railroad agents also served as express agents.* The claimant Barry was and is the railroad agent also serving as express agent. If the established guaranteed commission was $7.50 under such circumstances, Barry had no right reasonably to expect any different or greater guarantee.

Petitioners cited the following articles of the Agreement existing between the parties and charged that the respondent carrier violated the same:

> "ARTICLE XIX. All positions held by employes specified in Article 1 of this agreement shall be listed, showing locations, classifications, and rate of pay, which shall be part of this agreement. (See wage scale, pages 15 to 25, inclusive.)
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> "ARTICLE III. (a) The entering of employes in the positions occupied in the service or changing their classification or work shall not, except by mutual agreement between the committee and the management, operate to establish a less favorable rate of pay or conditions of employment than is herein provided.
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> "ARTICLE—Just following the wage scale of the Agreement.—These rates shall become effective December 1, 1927, and shall continue in effect until December 1, 1928, without change, and thereafter until changed as provided herein or under the provisions of the Railway Labor Act."

The findings ignore completely the allegation of a violation of these Articles of the agreement, upon which petitioners relied to support their claim, and I submit that unless we find, where a violation of agreement is specifically charged, that such violation did occur there is no sound basis upon which an award may rest sustaining the petitioners.

We may be indignant at the actions of the respondent or, as would appear in this case, at the actions of a third party, but a mere expression of indignation, however justly aroused, is not sufficient grounds upon which to rest a judicial determination of the issues.

The findings are erroneous in that they ignore completely the statement of the claim which is for retroactive restoration of a $25 monthly guarantee alleged to have been in effect "for handling the business of the Railway Express Agency originating and destined his station, and for handling the transfer of the express business of the Railway Express Agency from the N. C. & St. L. Railway to the Southern Railway at that point," Stevenson, Ala. The monthly guarantee was established in 1909. The transfer, as stated in the findings, was discontinued in 1921. But it is stated in the record that Clerk Potts, the individual with whom the arrangement was originally made, continued to receive the $25 until the express company relieved him as its agent in 1924. But in 1917 the express company (predecessor in the business to the Railway Express Agency) established a monthly commission guarantee of $7.50 *where railroad agents acted in the same capacity for it.* There is nothing in the record to suggest that any agent of the Railway Company acting in the dual capacity of railroad and express agent at this station ever expected or sought to retain a monthly guarantee of $25 prior to the instructions issued to Agent Barry by the Auditor of the Railway Express Agency.

Agent Barry succeeded to the Agency at Stevenson on July 15, 1930. In making his remittances of express funds for the month of August 1930, the first full month that he occupied the position and when his actions should have reflected his understanding with respect to the express commission, he deducted ten percent amounting to $21.25. Thereupon, the auditor for the express agency sent Agent Barry a credit memorandum for $3.75, directing him thereafter to observe a $25 minimum. The respondent in this case states that the auditor's letter was written in error and that no proper basis existed for giving such directions to the agent, and that the action of the superintendent of the Express Company in March 1933 directing the agent thereafter to observe a $7.50 minimum instead of $25 was a correction of the error. That the action

of the auditor was in error is plainly borne out by the petitioners' statement of his claim. They ask that claimant Barry be paid $25 per month as a minimum when his ten percent commissions do not amount to that sum for handling express originating at and destined to his station, and *for handling the transfer of express business of the Railway Express Agency from N. C. & St. L. to Southern Railway*, recognizing that the payment of $25 was to cover the handling of transfer as well as commissions; whereas, there is no transfer of express business at Stevenson, Ala., and has not been since May 1921.

The Referee finds in one place that "When Barry was appointed it is not shown that he knew of a $25 minimum." In another place that "While Barry was not advised of the extent of the guarantee, he is entitled to whatever it was." He also finds that the express company in April 1917 established a general minimum commission of $7.50 per month where railroad agents also served as express agents. The fact that the express company in 1909 entered into an arrangement with an individual to pay him a certain minimum sum each month for handling the express business at his station and for handling the transfer between the trains of the two carriers using the same, and that it continued to pay that individual the amount that it had promised to pay him as long as he performed the duties of agent for it, certainly does not vitiate the established minimum monthly guarantee for another class of employees for performing a part of the service embraced within that formerly rendered for a higher compensation. As the Referee has found, the Claimant Barry, when he acquired the position of Agent at Stevenson through displacement on July 15, 1930, did not have any expectation of receiving compensation from the Railway Express Agency in excess of commissions of ten percent with a monthly guarantee of $7.50. Therefore, he has suffered no injury.

The Referee states that the carrier claims Barry's predecessor accepted less than $25 monthly during four months in 1928 and 1930 when the commissions at ten percent did not equal that amount, which may imply that the figures supplied by the carrier are of doubtful value without other corroboration. On this point it may be significant that the petitioners in their reply to the carrier's submission quoted the figures from the carrier's submission for the months referred to and took no exception to them. On the other hand, there is left no room for inference of doubt of the probative value attached by the referee to the statement over the signature of the general chairman of what transpired between the route agent of the Railway Express Agency and Agent Barry, when the former visited him (Barry), allegedly, for the purpose of securing his consent to a reduction in the $25 minimum. And the Referee says that this officer (route agent) promised Agent Barry that the matter would be taken up with the chairman of the Order of Railroad Telegraphers.

The Railway Express Agency was not made a party to this case and was not called to appear before the Board. It was not afforded an opportunity to deny the allegations or to explain its handling of this matter, and yet the Referee makes the ex parte finding that its action would not indicate that there was any error in paying Agent Barry a minimum of $25 for a period of thirty-one months.

Failing to find that there was, as charged by the petitioners, a violation of certain rules of the agreement, what is relied upon to support the award? It rests upon "former awards of this division relied upon by the employees." The petitioners in their submission before this Board made no reference to any previous awards of this division. In presentation of the case to the Referee by members of the division, certain awards of the division were cited: Award 181 Docket TE–141, Award 218 Docket TE–226, Award 297 Docket TE–271, and Award 298 Docket TE–247. The last named award dealt only with the jurisdiction of the Third Division of the National Railroad Adjustment Board over the dispute submitted, and I assume therefore that the Referee does not refer to that award in his findings in the instant case. The other three awards dealt with claims in which the Order of Railroad Telegraphers appeared as petitioners against three railroads other than the respondent in the instant case. The bases for the claims in those cases differ from the basis for the claim in the instant case. In all of those cases there was cited by the petitioners, among other rules of the agreements between petitioners and the respondent carriers, a rule reading substantially as does Article XXIII of the Agreement between the petitioners and the carrier in the instant case. Article XXIII reads as follows:

"ARTICLE XXIII

"EXPRESS AND TELEGRAPH COMMISSIONS

"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 for similar positions."

In award 181 Docket TE–141 a rule of the same import and similar if not identical in language appeared in the agreement between the parties as Article XIV (1). It is quoted in the award by Referee Spencer and relied upon in sustaining the claim. In Award 218 Docket TE–226 a similar rule appeared as Article II (b) and it is quoted in the award by Referee Garrison and relied upon by him as one basis for sustaining the claim. In Award 297 Docket TE–271 the Referee does not quote the rule, but he refers to the agreement existing between the parties, and that he relates his award to the rule is evidenced by the following language appearing on page three of the award:

"It would appear to be a highly technical argument that abolition of commissions which is the equivalent of a reduction of 100 percent would require a revision of the wage rates; whereas, a reduction of ninety percent, seventy-five percent, fifty percent, or any other material amount would not require such revision."

In the instant case petitioners not only do not rely on Article XXIII of the agreement between the parties, but, at the hearing before this Division, in response to a question addressed to the General Chairman by the writer, "Is Article XXIII of the agreement involved in any way in this case?" he answered, "No, sir; it isn't."

I therefore submit that by the findings in this case the record is cast aside and the only basis shown for the award as rendered is former awards of the division which presented different circumstances in which the petitioners relied upon a rule not here involved.

The award exceeds the claim in that it goes beyond the scope of the claim. The claim requests that a minimum guarantee, alleged to have existed, of $25 a month for handling the business of the express agency originating at and destined to this station and for handling the transfer of express between the trains of the two carriers using the station be restored retroactively, whereas the award does not direct the restoration of the minimum alleged to have existed, as payment for services for which it is claimed (a part of which service it is admitted the claimant does not now and never has performed), but directs the respondent carrier to collect from a third party, not a party to the case, the amount involved in the claim and pay the same to the claimant, or, failing in that effort, to make good itself.

There also exists in the mind of the writer a question as to whether the procedure in the appointment of the honorable referee in this and fourteen other cases fulfilled the requirements of the Act under which this Board functions. It would seem to follow that if it did not, then this award and all other awards by such Referee are null and void. Section Three First (1) of the Railway Labor Act as amended June 21, 1934, provides:

"Upon failure of a division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this Section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees."

The question that causes the writer concern is whether, in the absence of any effort by a division to select a neutral person, the requirements of this portion of the Act may be said to be complied with.

The Mediation Board, in whom the appointing power rests, if the division shall fail in its effort to select a referee, has taken the position in an official communication to the Board that the law does require that the division make an effort to select a neutral person to act as referee in the event of a deadlock.

The circumstances attending the appointment of the honorable referee in the instant case are these: The Third Division was unable to reach an award in fifteen cases before it. These cases were deadlocked by action of the Division on August 13, 1936.

On August 14, without making any effort to select a referee, the Division, by action previously taken, recessed for a period extending through September 4. The Third Division was therefore in recess during nine days of the ten-day period following the deadlocking of the group of cases referred to.

On August 24, 1936, five members of the Third Division addressed a letter to the Secretary of the National Mediation Board in which they said in part:

> "The undersigned Members of the Third Division, National Railroad Adjustment Board, hereby officially certify to the National Mediation Board that the Third Division has failed to agree on the selection of a Referee within the ten days provided for in Section 3, First (L) of the Railway Labor Act, to sit with the Division as a Member thereof and render awards on disputes represented by fifteen dockets which were deadlocked August 13, 1936, because of the inability of the Division Members to secure a majority vote thereon.
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> "This certification, as stated above, is made under the provision of paragraph (L), Section 3, First, and request is hereby made that the National Mediation Board select a Referee for the purposes indicated.
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> "For the information of your Board, we beg to advise that the Third Division is in recess through September 4th. We trust, however, that the Referee will be appointed so that we can commence work on the above disputes on September 8th, or promptly thereafter, at which time the Third Division will have reconvened."

It does not appear from the records of the Third Division that the Mediation Board was informed that an effort had been made by the Division to agree upon and select a neutral person, or that it inquired whether such effort had been made, and certainly there was no formal advice by the Third Division to the Mediation Board that the members had attempted to agree upon the selection of a neutral and had failed. Indeed, such formal advice could not have been given because no such effort was made, the Division being in recess for a period of twenty-one days beginning the day after that on which the cases were deadlocked.

In the opinion of the writer, the above quoted provisions of the Act cannot be satisfied by a perfunctory pretense. In this opinion the said official communication from the National Mediation Board in this respect upholds the above conclusion. And if this communication of the National Mediation Board is correct under the law, then he submits there is properly a question whether under the circumstances the appointment of the Referee in the instant case satisfied the requirements of the Act.

GEO. H. DUGAN,

DISSENT

I concur with that portion of the dissenting opinion by Member Dugan which relates specifically to the award made by the Referee in this Docket TE–313.

I concur with that portion of the same dissenting opinion by Member Dugan which relates to the legality of the appointment of Referee Robert G. Corwin in this case and fourteen other cases before the Third Division. Also, I here indicate purpose to register extended protest, as due time and circumstances may require, addressed to the end of effecting discontinuance of the methods leading to the selection of a Referee according to the procedure indicated by the dissent in this particular dispute.

C. C. COOK.