

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: "Claim of General Committee of the Order of Railroad Telegraphers of Boston and Maine Railroad, that J. L. French, Railroad Station Agent at Hampton, N. H., and serving as Express Agent for the Railway Express Agency, Inc., shall be paid the commission rate of fifteen per cent (15%) on all outward business handled by him in the months of June, July, August and September of each year retroactively to June 1, 1936, which is the normal commission rate paid Agents on the Boston and Maine Railroad for such services. The amount of the claim as shown below is \$116.90 to the end of September 1937."

JOINT STATEMENT OF FACTS: The parties jointly certified to the following Statement of Facts:

"During the months of June, July, August and September, commencing with the season of 1929 the Railroad Agent at Hampton, N. H., who was also Agent for the Railway Express Agency, Inc., was paid 10% commission on outward express business by the Railway Express Agency, Inc. The other eight (8) months of the year this position is paid 15% on outward business by the Railway Express Agency.

"In October 1933 position of Agent at Hampton, N. H., was posted for bids by the Superintendent of the Railroad. The successful bidder was J. L. French.

"French deducted 10% on inward business and 15% on outward business from the time that he was installed as Agent for the Express Agency to and including the month of June 1934.

"On July 16, 1934, the Express Agency issued 'Debit Error Letter' No. 4630, in the amount of \$4.87, representing the difference in commission where Mr. French took 15% instead of 10% for the month of June 1934. Thereafter during the months of June, July, August and September, Agent French deducted but 10% on outward business as instructed by the Express Agency, in their Debit Error Letter of July 16, 1934. On July 1936 the General Chairman Telegraphers' Committee took up with the Assistant General Manager of the Railroad the question of placing this station on the basis of 15% commission on outward business. The request was declined. This case was again reopened on July 26, 1937. The claim is made up as follows:

there is attached as 'Carrier's Exhibit No. 1', a complete copy of letter of General Manager H. C. Trombly, Railway Express Agency, dated July 29, 1937, which shows reason for his conclusion to pay 15% commission on outward traffic which reason is stated to be 'in consideration of the changes in business handled we have concluded'

"To summarize:

- 1—Arrangements as to express commissions are between the individual Agent and the proper representative of the Railway Express Agency, Inc., not between the Boston and Maine Railroad and the Agency.
- 2—There is no dispute between the employees and the Boston and Maine Railroad over the interpretation or application of agreement between the Order of Railroad Telegraphers and the Boston and Maine Railroad covering rates of pay and working conditions and the Railroad does not waive its right to contend that the Third Division of the National Railroad Adjustment Board cannot properly decide what is here jointly submitted, the joint submission being made only for the purpose of carrying out the spirit of an understanding reached between the Executive Officers of the Labor Organizations represented on the Third Division and Committee of Managers that submissions would be jointly made.
- 3—If the Adjustment Board assumes jurisdiction in this case, then on the merits we contend:
 - (a) That Mr. J. L. French knew what the express commissions were during the summer months at the time he took the position in October 1933, even though the difference in the commissions did not take place until the following June.
 - (b) Knowing the conditions no claim or grievance was presented to the Railroad indicating that he was not satisfied with those conditions until July 1936, two years and nine months after he became Joint Agent of the Railroad and the Express Agency at Hampton, N. H.
 - (c) As in the case cited at Otter River, the Organization contended that rate of commission once established could not properly be reduced unless or until agreed to by the accredited representative of the employees, they cannot properly say in this case that rate once established must be changed to some other basis unless or until such a change is negotiated by proper representatives."

OPINION OF BOARD: Although the carrier questions jurisdiction of this Board to deal with the controversy presented, on the ground that it is not a party to any agreement with its employees concerning the rate of express commissions, such agreements as exist being between such employees and the Railway Express Agency, Inc., to which the carrier is not a party, the fact is shown by the evidence that the carrier has assumed to deal with the matter on behalf of the Railway Express Agency, counseled, advised and cooperated with it and concludes its argument with the statement its handling of the matter before the Board is "with the full knowledge and approval of the Railway Express Agency," and under these circumstances the objection is not well founded.

Apart from those circumstances this Board has repeatedly held and now re-affirms those conclusions, that express and telegraph commissions are so integral a part of agents' compensation that changes therein made by the Express Agency are cognizable by this Board in cases against rail carriers brought under rules similar to Rule 20 of the current agreement quoted by the carrier in its position. See Awards 387 and 392 for a full discussion of the matter.

The difficulty in the instant case, however, lies in the situation that the matter was handled as though Rule 20 was involved (although the employees

do not specifically cite it) where the facts do not fit Rule 20. The employees insist that there was a "reduction" in the rate of commissions made in 1929, whereas the undisputed facts are that there was no joint agency during the summer months prior to that year, the Express Agency having theretofore maintained its own exclusive agency. In that year, however, it made an agreement with the local railroad agent to handle the business joint, as he was doing the other months of the year and at a rate of 10% for those four months on outward business although the established rate for the balance of the year was 15%. The successor of that agent, (the claimant here who took over in 1933) claimed not to be bound by the action of his predecessor in agreeing to that rate and with the advent of the 1934 summer season began deducting 15% which the Express Agency immediately debited back to 10%.

The facts thus would properly be the subject of inquiry under the second paragraph of Rule 2 of the B. & M. Telegraphers' Schedule providing that, "When new positions are created compensation will be fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district" or the like provision of Rule 82 of the agreement between the Clerks' Organization and the Railway Express Agency which agreement we notice.

Since, however, the case was not progressed with the Management under either of these rules and the facts are insufficiently developed to pass on that issue, it will be necessary to dismiss this case but without prejudice to its renewal under either Rule 2 of the instant agreement or Rule 82 of the Clerks' Agreement with the Railway Express Agency, Inc., and, should the latter be invoked, the Agency should be made the party respondent.

It should be unnecessary to add that the action of the former agent in making a special agreement was not binding on either organization, or his successors represented by a collective bargaining agency under an agreement expressly dealing with the manner of establishment of rates.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the evidence does not sustain the claim presented which should be dismissed but without prejudice to its renewal in conformity with opinion.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of December, 1938.