

Award No. 1173
Docket No. TE-1179

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ALTON RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Alton Railroad, that Agent-Telegrapher-Leverman G. H. Schwartz at Godfrey, Ill., shall be reimbursed in the amount of \$176.63, which amount he was, over his protest, compelled to withhold from the earnings of his position during the months, April-July, inclusive, 1938, and pay for station help."

EMPLOYES' STATEMENT OF FACTS: "G. H. Schwartz occupies the position of Agent-Operator-Leverman at Godfrey, Ill., which position is included in the current Telegraphers' Schedule Agreement, which Agreement provides that he will receive as compensation for his services an hourly rate of pay from the Railroad Company and express and Western Union commissions."

"During the months of April-July, inclusive, 1938, on account of increased business due to the movement of asparagus additional help was needed at that station to operate the station. The Express Agency, with the consent of the Railroad Company, hired additional help needed, and required Mr. Schwartz to pay for the additional help from his own salary."

CARRIER'S STATEMENT OF FACTS: "The Agent-Operator-Leverman at Godfrey, Ill. is paid 10% commission for the handling of express shipments, and is the employe shown in the agreement with Telegraphers to whom express commissions are to be paid."

"Considerable asparagus is shipped by express from Godfrey, and during the period of heavy shipping it has been necessary to employ extra help for the handling and loading of such express shipments. The wages of this extra help have throughout the years been assumed by the agent, to whom the commissions are paid."

"Mr. G. H. Schwartz was Agent-Operator-Leverman during the season of 1938, and extra labor in the amount of \$176.63 was necessary for the handling of asparagus shipments, which the agent was required to assume and pay out of his commission earnings."

POSITION OF EMPLOYES: "An agreement bearing the date of February 16, 1929, as to rules and August 1, 1937 as to rates of pay, is in effect between the parties to this dispute."

"The wage scale of the prevailing agreement, appended to and made a part of the Telegraphers' Agreement, shows the basis of the average monthly compensation of the position in question, as follows:

"The 10% commission paid for the handling of express shipments is payment for all of the handling necessary incident to the receipt, billing, handling and loading of such shipments. This understanding is well known at all stations on the Alton Railroad where the Carrier's agents act as commission agents for the Railway Express Agency. It is a common practice for agents to share express commission earnings with other employees performing service in connection with handling such shipments, and at stations where express shipments are very large, agents employ extra help at their own expense. For instance, at Lemont, Ill., for many years the express business was very heavy, with commissions running up as much as \$400.00 to \$500.00 per month, and in order to handle the business, the Agent employed a clerk at his sole expense, without complaint or protest, thus indicating his understanding that such extra expense must be assumed by him, and paid out of his express commissions.

"This is only a fair and proper understanding, as express commissions are not a honorarium, but are compensation for all service necessary in the handling of express business. There is nothing in the agreement with the Telegraphers to support any presumption or claim that the Carrier or the Express Agency is to employ any extra help needed to handle express shipments in order that the agent would be enabled to earn large commissions. Further, there is no agreement between the Express Agency and the Telegraphers. The Agent, so far as his express work is concerned, is an independent contractor with the Express Agency.

"Prior to his assignment as Agent-Operator-Leverman in July, 1937, Mr. Schwartz was employed as Operator-Leverman at Godfrey station for 15 years or more, and had full knowledge of all arrangements in effect at that station in connection with the handling of asparagus shipments by express. He was aware of the fact that it was necessary for him to pay the compensation of extra help employed for the handling of these shipments during the rush period, and he so paid them during the 1938 shipping season.

"Protest in this case was not filed until March 30, 1939, and actual claim was not made until June 18, 1939. At the start of the 1938 shipping season, although Mr. Schwartz had full knowledge of all arrangements in effect, he was fully instructed by Route Agent H. A. Goodrick, of the Railway Express Agency, and at the beginning of the 1939 shipping season, because of his attitude and the indifference that he displayed, induced no doubt by the position he was then taking that he should be relieved of having to assume the expense of employing extra help, it was necessary for the Route Agent to take active charge of all arrangements for the handling of express, to insure that the business would be properly taken care of. In such handling, and because of the indifferent attitude of Mr. Schwartz, the Route Agent got in touch with a couple of boys, and instructed them to report to Mr. Schwartz for service, which they did, and the Agent arranged for their employment and fixed their compensation.

"It is the position of the Carrier that the 10% commission paid the Agent at Godfrey for the handling of express business covers all handling of the business, and that if extra help is needed for such handling, the Agent is obliged to assume the expense, which is in accordance with the practice prevailing at Godfrey and at other stations for many years.

"The claim of the employees is not supported by any schedule rule or past practice, is without merit, and should be denied."

OPINION OF BOARD: Under the Agreement of February 16, 1929, the claimant in this proceeding, Agent-Operator-Leverman at Godfrey, receives 72 cents per hour (increased to 77 cents per hour in August 1937), and in addition Express commissions and Western Union commissions. The dispute here involved concerns his express commissions during the period of April to July, inclusive, of the year 1938.

While the Agreement does not specify the amount of the express commissions, these commissions, paid by the Express Agency, are conceded by

both parties to be 10 per cent of the revenues received for express shipments handled at that station, in conformity with the established arrangement in effect at all stations on the Alton Railroad. The question at issue is whether or not, under the Agreement, the claimant was properly required to pay for extra help out of his commissions during the asparagus season (April to July) of 1938.

The bulletin under which the claimant received his assignment indicated, for the Godfrey Agency, "Commissions about \$7.00 monthly (not including express commissions during asparagus season)." During the asparagus season of 1938—the first season in which the claimant served as joint agent—his express commissions amounted to \$539.70, out of which he paid \$176.63 for extra help. The Agreement is silent with respect to the absorption of payments for extra help by the agent, the only provision bearing upon express commissions being the following declaration contained in Rule 12: "Should commissions be discontinued causing loss in compensation, adjustment of salaries affected will be made."

It is not uncommon for express agents to share their commissions with other employes or to absorb payments for extra help. At this station, in any event, it has always been necessary for the agent to employ extra help during the heavy movement of the asparagus shipping season, and the agent has always paid for this help out of his commission earnings. There is evidence of record that this practice has been in effect for a period of at least 35 years; that it was in effect at the time of the negotiation of the Agreement of 1929; that it was in effect at the time the present combination position of Agent-Operator-Leverman was established in 1932; that it has continued in effect without protest throughout the life of the Agreement until the present complaint was filed and the resulting claim was instituted; and that at no time has either the Express Agency or the rail carrier assumed this expense, or any part of it, in connection with the heavy traffic movement of the asparagus season.

In these circumstances the absorption by the agent of payments for the extra help employed during the asparagus season must be held to reflect the intent of the parties; to hold otherwise would be, in effect, to alter the agreement of the parties. It should be noted, however, that this disposition of the proceeding is governed entirely by its own distinctive circumstances—that it involves no promulgation of a principle of general applicability (that is, that express commissions necessarily cover all expenses of handling) either on this property or elsewhere.

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 of record does not disclose any violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1940.