

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION  
Curtis G. Shake, Referee

**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS**  
**NEW YORK CENTRAL RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Line West of Buffalo, that the established basis of commissions paid the joint railway-express agency at Mentor, Ohio, prior to October 1, 1933, on all express transportation business received and forwarded by the Henry Merkel, Sr., Nursery and the Wayside Gardens Nursery at Mentor, which was arbitrarily discontinued by the Railway Express Agency, Inc., on or about October 1, 1933, with the unilateral consent of the Carrier in violation of the terms of the Memorandum of Conference and Understanding of June 26, 1926, between the Carrier and the Committee, shall be restored to the joint railway-express agency at Mentor; and that the joint railway-express agent at Mentor be compensated in the amount of express commissions he has thereby been wrongfully deprived of, retroactive to November 1, 1936, the date the joint railway-express agent was reestablished, after having been discontinued on May 1, 1936.

**EMPLOYES' STATEMENT OF FACTS:** An agreement as to rules of working conditions and rates of pay has been in existence between the parties to this dispute for many years prior to October 1, 1933, and was last revised as to rates of pay on December 1, 1941, and, as to rules, on February 1, 1943. The joint railway-express agency position at Mentor, Ohio, is covered by said agreement.

A Memorandum of Conference, bearing date of June 26, 1926, exists between the parties to this dispute, and provides in part as follows:

"It is understood that the American Railway Express Co., will not make any change in present basis of commission without first conferring with the representatives of the Railroad Company, and the latter will in turn confer with the representatives of the employees before any action is taken."

The Railway Express Agency, Incorporated, is the successor to the American Railway Express Company, referred to in the above cited portion of the Memorandum of Conference of June 26, 1926.

Prior to, on or about October 1, 1933, the joint railway-express agent at Mentor was paid the established basis of commissions by the Railway Express Agency, Incorporated, on all express transportation business received and forwarded by the Henry Merkel, Sr., Nursery and the Wayside Gardens Nursery at Mentor, and these commissions formed a part of the average monthly compensation of the joint railway-express agent.

the Carrier should be called to account. It is as if two people were sharing a fund,—in this instance a month's pay. If these parties agree on the proportions which belong to each of them, and the holder of the fund who is the debtor pays on that basis he should not afterwards be called on by either of them for a larger share.

**FINDINGS:**—That the claim is now barred by laches and estoppel.”

Referee Fox in First Division Award 5821 deciding a dispute involving improper discontinuance of yard assignments stated:

“Even if a protest and claim, based on an improper discontinuance of yard assignments, would have been in order, if made within a reasonable time, the general acquiescence, over a long period of time, by both roadmen and yardmen, in what was done, must be held to be the equivalent of a contemporaneous construction of the contract on the basic question here involved, and the claim now made comes too late. While, under the contract, no limitation is placed on the right to register protest, and to assert claims, the old true rule, applicable to any claim before any tribunal, that reasonable diligence must be exercised by the claimant, especially when delay is prejudicial to the other party to the controversy, cannot be ignored.”

The situations dealt with in the above Awards are identical with that on this carrier. In the dispute on this property the Railway Express Agency extended their pickup and delivery service to take care of the express traffic outside the corporate limits of Mentor on October 1, 1933 and no protest or claim was received until March 15, 1940, six and one-half years after the occurrence.

It is the carrier's final contention that the claim in this case is entirely without merit and should be denied.

**OPINION OF BOARD:** It is claimed that the joint agent of the Carrier and the Railway Express Agency, Inc. at Mentor, Ohio was wrongly deprived of certain commissions upon which his compensation depended, in part, when the Express Agency extended pick-up service from its independent office at Painesville, Ohio, into the territory formerly served by the Mentor office. The parties agree that after such pick-up service was established certain named shippers ceased to patronize the Mentor office, with a consequent loss of commissions to the agent.

The organization asserts that there has been a violation of the terms of the Telegraphers' Agreement of May 16, 1928 and of the Memorandum of Conference and Understanding dated June 26, 1926. Article 18 of said agreement says:

“When express \* \* \* commissions are discontinued \* \* \* at any office thereby \* \* \* reducing \* \* \* the average monthly compensation paid to any position, prompt adjustment of the salary affected will be made conforming to rates paid for similar position.”

The gist of the Memorandum, in so far as it applies to our inquiry, is that “the present basis of commission,” on express business received at the Mentor office shall stand, unless changed by negotiation.

The Carrier says that there is no reasonable assurance that the shippers above referred to would have continued to patronize the Mentor office had there been no change in the character of the service; and that the extension of pick-up service from the Painesville office was necessary to meet truck competition.

On this state of the record we are unable to say that there has been any change in the “basis of commission” applicable to the Mentor agency. The commission rates there, 5% on carload and 10% on less than carload ship-

ments remain exactly what they were before. To hold that the agent is entitled to protection against practices and methods of operation that may result in a decline in the volume of business upon which his commissions are computed would lead to endless controversy and confusion. Such a conclusion would involve the parties in a consideration of every conceivable circumstance that might be calculated to disturb the continuance of a steady flow of business at a given point. We do not believe that this subject was within the contemplation of the parties to the above agreement when they provided that there should be no change in "the basis of commission," without negotiation.

**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 there was no 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 11th day of May, 1944.