Award No. 2969
Docket No. TE-2960

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

(James M. Douglas, Referee)

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Chicago, Burlington & Quincy Railroad, that the express commission rate of five per cent (5%) on the express charges on all carload express shipments is the established rate for all joint railway-express agents of the Carrier east of the Mississippi River, including in particular the joint railway-express agents located on the La Crosse Division, which is east of the Mississippi River; that the joint railway-express agent at Proving Ground, Illinois, on the La Crosse Division is entitled to this established express commission rate of five per cent (5%) on the express charges on all carload shipments handled by him at his station; and that the joint railway-express agent at Proving Ground, Illinois, shall be paid at this established express commission rate on all carload express shipments handled by him since commencing July 5, 1941.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date of September 1, 1927, as to rules of working conditions, and December 27, 1943, as to rates of pay, is in effect between the parties to this dispute. The joint railway-express agency at Proving Ground, Illinois, on the La Crosse Division, was covered by said agreement during the existence of this dispute.

Five per cent (5%) of the express charges has for many years been the established express commission rate on carload express shipments payable to joint railway-express agents of the Carrier at stations east of the Mississippi River, which territory includes the La Crosse Division and the joint railway express agency at Proving Ground, Illinois, on this Division.

Commencing July 5, 1941, the Railway Express Agency, Inc., with unilateral consent and approval of the Chicago, Burlington & Quincy Railroad arbitrarily fixed a reduced rate of five dollars ($5.00) per car express commission rate on all carload express shipments handled by the joint railway express agent at Proving Ground, Illinois.

POSITION OF EMPLOYES:

Historical Review

Basic or established express commission rates paid jointly railway-express agents are those which were fixed by the several predecessor express companies, which, when these companies were taken over by the American Railway Express Company and later by the Railway Express Agency, Inc., became obligations of the successor express companies. As the earnings by the joint railway-express agents from these established express commission rates were taken into consideration by the rail-carriers in fixing the railroad wages of joint railway express agents for the purpose of collective bargaining agreements, no changes in

nance Depot called the Agent and informed him as to the movement and the train and date on which the cars were to go forward, and, in addition, informed him of the ETO number and any other instructions pertaining to the movement. The cars were loaded by the Government employes at the Ordnance Depot several miles from the Proving Ground Station and were inspected by the Railroad Company's inspectors employed at the Ordnance Depot for that purpose, so that all the Agent had to do was to receive the car number, seal numbers, and other information cited above, make the way bill and place the car cards on the car when the train arrived at the station. The carloads of express were placed in the trains ordinarily at the Savanna Ordnance Depot. The Agent's functions, consequently, were relatively insignificant in their relation to his day's work, and in relation to the sum claimed as commission. In evidence of the services required of the Agent in this case in handling carload express, we submit, as Exhibit No. 2, photostat copy of affidavit made by the Railroad Company's Station Auditor, G. R. Rasmussen, and attested to by the claimant, J. C. Wittenberger Proving Ground, Illinois, and as Exhibit No. 3, photostat copy of affidavit made by James C. Cottral, Traffic Manager, Savanna Ordnance Depot. Submitted as Exhibit No. 4 is photostat copy of affidavit of Station Auditor G. R. Rasmussen, attested to by joint railway-express agent, J. P. Groff, Bay City, Wisconsin, which shows as a matter of information the contrast between that station where express business is a matter of solicitation by the Agent, and Proving Ground, Illinois, where solicitation is not involved.

Upon discontinuing the joint railway-express agency at Proving Ground, Illinois, and making it an exclusive agency of the Carrier on July 14, 1942, the following rule of agreement became applicable, viz.:

> "RULE NO. 37 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."

In compliance with the terms of the quoted rule the wage rate was adjusted in the amount of 12 cents an hour, from 83c to 95c per hour, effective as of July 14, 1942. This adjustment was confirmed by the Organization party to this case, per copy of letter dated March 2, 1943, submitted as Exhibit No. 5.

SUMMARY. The rate of commission at Proving Ground, Illinois, was established for carload and less-carload express by the American Railway Express Company, September 1, 1918. The established rate of commission remained unchanged from that date and throughout the period of the claim. The claimant employe (Agent J. C. Wittenberger) served at Proving Ground, Illinois, from May 19, 1933, to July 23, 1934, and from August 11, 1934, through the period of claim (see record on Exhibit No. 1), and during this period of service was aware of the rate of commission, and, in fact, retained commission from express charges collected according to the established rate of commission. To say at this late date that "5%—Maximum $5.00" was not a part of the commission rate would be to say that there was no established rate of commission at all. That would be tantamount to saying that the same less-carload and carload express rate of commission does not exist at the 187 stations listed herein, which were established in like manner.

Consequently, it is the position of the Management that the established rate of commission consisted of "10% on less-carload, 5% with maximum of $5.00 on carload express" and that Agent Wittenberger is entitled to a maximum commission of $5.00 for each of the carloads of express listed in the Management's Statement of Facts.

OPINION OF BOARD: The dispute in this claim is whether the express commission payable to the joint agent at Proving Ground, Illinois is an unlimited 5% on carload shipments as claimed by the Organization, or is 5% with a maximum of $5.00 per car as contended by Carrier. Carrier further contends such limit was imposed when the agency at Proving Ground was first established on September 1, 1918.

To sustain the claim Organization asserts that the predecessor express company operating over the Carrier's LaCrosse Division of the present extended lines

of Carrier established an unlimited rate of 5% for carload shipments for joint agents. This rate was not changed when the express business was taken over by the American Railway Express on July 1, 1918. An officer of that company appearing before the United States Railroad Labor Board in 1926 testified: "We continued the salaries. We continued the rates of commission every place just as they were. * * * As a matter of fact, under the Director General we would not have had 'authority either to increase or decrease those rates, except with the consent of Mr. McAdoo . . . ' According to this testimony it is a logical conclusion that such rate was in effect for joint agents on the LaCrosse Division when the Proving Ground station was first established on September 1, 1918 within the period of Federal Control and a joint agency created."

Carrier questions the statement such rate was effective generally throughout the LaCrosse Division. However, the record contains other evidence of an unlimited 5% rate. The Express Company attempted to impose a $5.00 maximum on June 20, 1931 generally at stations on the LaCrosse Division. Claims were thereafter made for the difference between the $5.00 maximum and the full 5% commission for a number of stations which had made carload shipments. These claims were allowed and the Express Company agreed "to restore the former rate of 5% commmission on carload shipments at such stations."

Up to July 5, 1941, when the first carload shipment involved herein was made, Proving Ground had never before made any carload shipments. Upon making his first carload shipment the Agent at Proving Ground claimed without delay the full 5% which was countered with an offer of the $5.00 maximum per car. Shortly thereafter a separate express agency was established.

Carrier presents documentary evidence showing a list of the various agents who filled the position at Proving Ground from its inception. Such documents bear the legend "*Maximum $5.00 per car*". This record appears on its face to be of doubtful authenticity. Organization contends if such rate was attempted to be established on September 1, 1918, as Carrier claims, it was done without notice and without negotiation and was contrary to the testimony before the Labor Board quoted above.

Carrier further argues that the carload shipments were all government business and required no solicitation. Even so, that fact does not alter the Agent's right to his commission at the proper rate, nor does the fact the Agent's commission would reach unexpected heights because of war conditions.

Claimant has met the burden of proof. The evidence in support of the claim is sufficient to sustain it.

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 Carrier violated the Agreement.

AWARD

Claim sustained as to the joint railway-express agent at Proving Ground, Illinois.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary,

Dated at Chicago, Illinois, this 2nd day of November, 1945.