

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY

(Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Company (Pacific Lines), that the provisions of the Milk and Cream Agreement, executed by the parties signatory to the Telegraphers' Agreement on January 1, 1939, and continued in full force and effect under the Telegraphers' Agreement effective December 1, 1944, by the Memorandum of Agreement of November 16, 1944, apply to the agency position at Bakersfield, California, a position newly incorporated into the Telegraphers' Agreement effective December 1, 1944, as of that date—December 1, 1944.

JOINT STATEMENT OF FACTS: 1. There is in evidence an agreement between the carrier and its employes, represented by the petitioner, bearing an effective date of December 1, 1944 (hereinafter referred to as the agreement covering telegraphers), copy of which is on file with this Board and is hereby made a part of this dispute.

2. Prior to December 1, 1944, the position of agent at Bakersfield, a station on the carrier's San Joaquin Division, was not included within the scope of any agreement, however, effective December 1, 1944, said position was included within the scope of the agreement covering telegraphers which became effective that date.

3. Both prior and subsequent to December 1, 1944, Mark Wilson (hereinafter referred to as the claimant) was assigned to the position of agent at Bakersfield.

4. Under date of March 9, 1945, the claimant made claim to the division superintendent under the agreement of January 1, 1939, for the payment of commissions on milk and cream shipments handled at and moving to and from Bakersfield for dates beginning December 1944, and continuing each month thereafter. By letter dated April 2, 1945, the division superintendent informed the claimant that he was not entitled to milk and cream commissions under the agreement of January 1, 1939.

5. Under date of October 17, 1945, the petitioner's local chairman submitted claim on behalf of the claimant for commissions under the agreement of January 1, 1939. This claim was denied and was subsequently appealed to the chief operating officer of the carrier designated to handle such disputes and was again declined. Copy of correspondence between carrier's representatives and petitioner's representatives relative to said claim are attached as Joint Exhibit A.

January 1, 1939 was not included or made a part of the agreement covering telegraphers which became effective December 1, 1944; it must likewise be apparent, since no provision was made therefor in the latter agreement, that the carrier did not agree or make any commitment that all agents covered by Rule 1 and listed in the wage schedule, would receive commissions on milk and cream under the terms of the agreement of January 1, 1939; on the contrary, the parties to the Memorandum of Agreement specifically agreed that said agreement of January 1, 1939, would "continue in full force and effect under its respective provisions," and thus confined its operation solely to those agents and agent-telegraphers who were covered by the Telegraphers' Agreement effective September 1, 1927.

Article 8, Section 3 of the agreement of January 1, 1939, which the petitioner's general chairman alleges provides for the allowance of commissions to "all Agents handling milk and cream," is as follows:

"Agents and agent-telegraphers, who come within the scope of the Agreement referred to in the Preamble of this Agreement, but who are not joint agents for the Company and the Railway Express Agency, Incorporated, on the date this agreement is executed, who are required to handle milk, cream and related commodities designated in Article 1 of this Agreement, shall be paid commissions for such handling in the manner described and in accordance with the provisions of Article I to VIII inclusive of this Agreement, effective with the date this Agreement is executed, and during the time this Agreement is in effect." (Emphasis ours.)

Since it is an admitted fact that the position involved in this dispute, i.e., the position of agent at Bakersfield, California, was not included within the scope of the agreement referred to in the Preamble of the agreement of January 1, 1939, together with the fact that it has been established that the latter agreement was not included or made a part of the agreement which became effective December 1, 1944, it is manifest that no basis exists for the general chairman's allegation that the claimant—or in fact, the occupant of any other position of agent or agent-telegrapher that was not included within the scope of the Telegraphers' Agreement effective September 1, 1927—is entitled to receive commissions under the provisions of Article 8, Section 3 of the agreement of January 1, 1939.

The carrier submits that it has conclusively established that the claim in this docket is without basis or merit and therefore, respectfully asserts that it is incumbent upon the Division to deny said claim.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. Prior to December 1, 1944, the position of Agent at Bakersfield, California, was not included within the scope of any agreement. On and after that date the position was included within the scope of the Agreement covering Telegraphers, which became effective December 1, 1944. Mark Wilson, Claimant, was Agent at Bakersfield both before and after December 1, 1944. On March 9, 1945, he made claim for payment of commissions on milk and cream shipments handled at his station on and after December 1, 1944. He bases his claim on the Agreement of the parties entered into on January 1, 1939 relating to commissions to be paid for handling milk, cream and related products.

This claim presents the question of whether or not the provisions of the Milk and Cream Agreement apply to the position of Agent Bakersfield, which is included in the present Agreement of the parties effective December 1, 1944, but was not included in the prior Agreement effective September 1, 1927, which the present Agreement supersedes.

Rule 45 of the present Agreement provides in part:

"Section (a). This agreement supersedes all previous agreements, * * *."

To avoid the effect thereof, so far as here material, the parties on November 16, 1944, entered into an Agreement as follows:

"* * * each of the described documents shall continue in full force and effect under its respective provisions, * * *."

* * *

2. Milk and Cream Agreement dated January 1, 1939; * * *."

From the foregoing it will be observed that the Milk and Cream Agreement was not included in, made a part of, or expressly made applicable to the Agreement effective December 1, 1944, but, by the Memorandum of Agreement dated November 16, 1944, it was continued "* * * in full force and effect under its respective provisions, * * *." (Underscoring ours.) Consequently we must turn to the Agreement itself to determine the extent of its coverage.

The Organization primarily contends that the use of the words "current agreement" in the Milk and Cream Agreement is controlling. It contends that while the Agreement of September 1, 1927, was used in the Milk and Cream Agreement it was used only to identify the current Agreement then in effect while now, because the December 1, 1944 Agreement supersedes it, that language relates itself to the present current Agreement.

With reference to whom it is applicable the Milk and Cream Agreement provides, in its "Preamble," as follows:

"This Agreement, entered into between the Southern Pacific Company * * * and its employees (hereinafter designated as Agent or Agent-Telegrapher), who are within the scope of the Telegraphers' current Agreement, effective September 1, 1927 (hereinafter designated as the Agreement), represented by the Order of Railroad Telegraphers, * * *."

It will be observed that by its provisions the Milk and Cream Agreement is limited to agents or agent-telegraphers who are within the scope of the Agreement effective September 1, 1927.

Under Article VIII, Covenants and Conditions, the Milk and Cream Agreement provides, in part, as follows:

"Sec. 2. Agents and agent-telegraphers, who come within the scope of the Agreement referred to in the Preamble of this Agreement, who are joint agents for the Company and the Railway Express Agency, Incorporated, on the date this Agreement is executed, shall be paid commissions for handling milk * * * during the time this Agreement is in effect.

Sec. 3. Agents and agent-telegraphers, who come within the scope of the Agreement referred to in the Preamble of this Agreement, but who are not joint agents for the Company and the Railway Express Agency, Incorporated, on the date this agreement is executed, who are required to handle milk, * * *, shall be paid commissions for such handling * * * during the time this agreement is in effect."

From an application of these provisions and the provisions of the Agreement as a whole we come to the conclusion that the Milk and Cream Agreement limits itself to the employees that are within the Telegraphers' Agreement effective September 1, 1927. This does not have the effect of keeping that Agreement alive, as it has been fully superseded by the Agreement effective December 1, 1944, but uses it solely as evidence to determine the positions to which the Milk and Cream Agreement is applicable. Had the parties intended that the Milk and Cream Agreement should be applicable to the Agreement effective December 1, 1944, it would have been easy for them to have said so but when they expressly provided that it "* * * shall continue in full force and effect under its respective provisions, * * *" we

are bound to interpret it accordingly and to limit its application in accordance therewith.

We find the Milk and Cream Agreement is not applicable to the position of Agent at Bakersfield and therefore the claim is denied.

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

That both parties to this dispute waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of August, 1949.