

Award No. 4792
Docket No. TE-4661

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
RAILWAY EXPRESS AGENCY, INCORPORATED

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers representing the joint railway-express agents of the Railway Express Agency, Inc., on the Seaboard Air Line Railway,

(1) That the Railway Express Agency, Inc., unilaterally and improperly diverted Government express shipments destined and billed to Deerfield Beach, Florida, a station on the Seaboard Air Line Railway, to Boca Raton, Florida, a station on the Florida East Coast Railway, October 9, 1943, through November 21, 1945, thereby improperly depriving J. E. Haire, Jr., the joint railway-express agent at Deerfield Beach, Florida, on the Seaboard Air Line Railway of his rightful and contractual express commissions earnings in the total approximate amount of \$867.56 accruing to him on all of such express shipments during that period; and

(2) That J. E. Haire, Jr., the joint railway-express agent at Deerfield Beach, Florida, on the Seaboard Air Line Railway shall be paid by the Railway Express Agency, Inc., the express commissions earnings to which he was contractually entitled on all of the Government express shipments that were thus unilaterally and improperly diverted from his station during the above stated period of which he was thereby deprived.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date April 1, 1917, as to commission rates and rules of working conditions was in effect between the parties to this dispute during the period of this claim. See Award No. 548 of the Third Division of the National Railroad Adjustment Board.

Deerfield Beach station, Florida, on the Seaboard Air Line Railway, and J. E. Haire, Jr., the joint railway-express agent at Deerfield Beach were covered by said agreement.

During the year 1943, and until November 21, 1945, the United States Government were shipping a great deal of material by Railway Express Agency, Inc., to its Boca Raton Air Field. This Air Field is located approximately the same distance from the joint railroad express agency at Deerfield Beach, Fla., on the Seaboard Air Line Railway and the joint railroad express agency at Boca Raton, Fla., on the Florida East Coast Railway.

During the period of this claim, the United States Government elected to make Deerfield Beach, Florida, on the Seaboard Air Line Railway, the destination express agency for its express shipments.

handled through Boca Raton station, and there is no basis for this claim which would result in the Carrier paying commissions to two agents on the same traffic, as stated by the Referee in Award No. 2522, Third Division, National Railway Adjustment Board, Docket TE-2459:

"We do not think there can be any doubt as to the right of a consignee, with the consent of the carrier, to divert express in transit. To hold that, notwithstanding such diversion, the agent at point of destination is still entitled to a commission for handling the shipment would impose a penalty on the carrier which is not contemplated by the agreement."

This claim is clearly based on the assumption that because certain Government Bills of Lading might have been made out to Deerfield Beach, that the shipments were actually marked to that point. That is purely conjectural. It must be remembered that the destination of all these shipments was Boca Raton Air Field. Boca Raton is a station on the Florida East Coast Railway. There is no Boca Raton station on the Seaboard Air Line. Bills of Lading in some instances were undoubtedly made out to Deerfield Beach, while the shipments were marked to Boca Raton, but deliveries were effected by the joint agent at the respective stations where the shipments were received, and commissions paid to the joint agents in accordance with the rate of commission in effect at their respective stations. Due to the lapse of time between the dates of delivery of the shipments and the date claim was filed, it is of course impossible to determine in all instances how these shipments covering the period of the claim were marked. However, specific instances investigated (General Chairman Thompson's letter of December 4, 1944, and Agent Chalker's letter of December 15, 1944) indicate the incorrectness, at least, of Agent Haire's information. Note particularly last paragraph of Agent Chalker's letter in which he says that no shipments marked Deerfield have been taken into his account, subsequent to the instructions of April 11, 1944, and that on several occasions he received a few pieces on a lot shipment for Deerfield, but while delivery was made through the Boca Raton Agency, no charges were taken into account as the Agent at Deerfield held the billing and had taken same into his account.

The claim of Agent Haire covering the period October 9, 1943 through November 21, 1945 is highly questionable in the absence of proof that he was deprived of earnings to which he was rightfully entitled. During the period October 7, 1943 to December 16, 1943, and subsequent to April 11, 1944, shipments for Boca Raton Field were routed to the office to which addressed.

The claim in this case should be dismissed because it lacks evidence of violation of any provision of the contract. There is no provision in the contract providing for payment of commissions on business which is not "received" at or "forwarded" from the station at which Mr. Haire serves as joint agent. The shipments on which commissions are claimed were not "received" at Deerfield. They were "received" and delivered to the Air Field at Boca Raton by the joint agent at that office, who was paid commissions thereon. Agent Haire does not contend that he was deprived of any commissions on shipments received at and forwarded from Deerfield Beach, but is endeavoring to collect on shipments which did not move through his station.

which did not move through his station.

In the handling of this Government business the right and interest of the Army authorities at destination, Boca Raton, Florida, must be the determining factor. The Carrier and its employees owed a duty to observe the expressed wishes of the Army authorities as to where they desired these Government shipments delivered. Insofar as it was possible the Carrier respected those wishes.

The claim in this case is entirely without merit and should be denied.
(Exhibits not reproduced.)

OPINION OF BOARD: Boca Raton, Florida, is a point on the Florida East Coast Railroad; Deerfield Beach is a point on the Seaboard Air Line Railway. Between these two points, but closer to Boca Raton, an Army air-

field known as Boca Raton was activated during the time mentioned in the notice of claim. The Claimant is the Joint Agent at Deerfield Beach and makes claim for commission earnings as indicated.

The Agreement between the Southern Express Company and the Joint Agent provides for the payment of commissions on total business received and forwarded. Although not expressed in these exact words, the gist of the Claimant's contention is that shipments in question should, in effect, be treated by this Board as having been "constructively received" at Deerfield Beach because the Carrier improperly diverted the shipments.

There is considerable confusion in the record with respect to the attitude of the consignee (U.S. Army Air Corps) concerning the preferred of the two points for picking up shipments destined for Boca Raton Field. Initially, it appears that nearness to the station was the governing factor, then the question of land grant rates on either of the railroads received consideration; later it appears that that was no longer a factor, but that the matter of avoiding split shipments assumed some importance. Because of changing wishes of the Air Corps personnel, changes in Superintendent's instructions were necessary.

In Award 2555 this Board, with Referee Shake, stated as follows:

"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 believe that this quoted statement affords a sound principle for the consideration of a case such as this. Certainly, the Carrier at the request of the consignee can divert shipments, regardless of how billed or marked, without liability for commissions to a Joint Agent at the point of original destination. To prevail in this instance, we believe that it should be incumbent upon the Claimant to establish that Carrier diverted shipments definitely marked for his station, contrary to the expressed wishes of the consignee, and for the purpose of evading the terms of the Agreement in so far as it affected his rights to commissions. The evidence of record does not preponderate in favor of such a conclusion. It follows that the claim was be 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 hearing thereon;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 did not violate 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 28th day of March, 1950.