

Award No. 12071
Docket No. TE-11049

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago Great Western Railway that:

1. Carrier violated and continues to violate the agreement between the parties when, because of express commissions being discontinued, it failed and refuses to adjust the salary of the positions of Agent-Telegrapher at Swaledale, Iowa, Meservey, Iowa, and Somers, Iowa to conform with the rate paid a similar position.

2. Carrier shall be required to adjust the rates of the positions mentioned above to conform with the rate of the position of Agent-Telegrapher at Manning, Iowa, a similar position, to be effective August 30, 1957.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

Swaledale, Meservey and Somers are stations located on the Minnesota Division of this Carrier's lines and all are in the same seniority district. At each station there is one position of Agent-Telegrapher under the Agreement. At the time these positions were established and for many years thereafter the occupants of the positions were joint agents of the railroad and the express company or express agency. For the handling of the express business they were paid the established commission of 10% of L.C.L. revenue and 5% of carload revenue on all shipments handled at their stations.

Express commissions, as a part of regular compensation, were taken into consideration by the Carrier and the Organization in establishing and fixing rates of pay for positions covered by the agreement. It was recognized by the parties to the agreement that from time to time conditions would change. Some stations which were receiving express commissions might have the commissions discontinued; sometimes because of handling on other carriers or methods of transportation, because of the express business in a town reaching sufficient volume to warrant the express company establishing a full-time salaried agent or other reasons. Other stations might have express commis-

It will be observed that the duties and responsibilities at Meservey are much less than at Readlyn, although the rate of the latter station (which is not in dispute) is the same. As a matter of fact, Meservey is more comparable to Hansell which has a rate of pay 1.2 cents per hour less than Meservey and, if any adjustment is due at the latter station, a decrease is in order.

On the basis of the above comparisons, and assuming that the positions involved in this dispute are to be adjusted pursuant to Rule 21, it is clear that there is no justification for an increase in the rates of pay; as a matter of fact, the rates should be decreased.

As previously stated, it is the Carrier's primary position that claim is barred under terms of Rule 23; it is the Carrier's further position that claim must necessarily be dismissed by the Third Division in order that the Management and General Chairman may discharge the obligation imposed by Rule 14(c) and agree upon a rate of pay covering the positions involved in this dispute.

Carrier affirms that all data in support of its position has been presented to the other party and made a part of the particular question in dispute.

OPINION OF BOARD: There is no conflict of evidence that express commissions were discontinued at Swaledale, Meservey and Somers, Iowa, on or about May 16, 1957. There is also no dispute that Rule 21 applies. This Rule reads:

"Rule 21. When express or commercial telegraph commissions are discontinued or created at any office, thereby reducing or increasing the average monthly compensations paid to any position, prompt adjustment of the salary affected shall be made conforming to rates paid for similar positions."

Carrier contends, however, that the claim was not presented within the time limit provisions of Rule 23(a) which, in part, states:

"All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based . . ."

The claim was first presented to the Carrier on October 26, 1957.

Petitioner contends that this is a continuing claim properly filed under Rule 23(d) which, in part, reads:

"(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof . . ."

In Award 10423, with the same Referee, we said:

"There are no clear cut decisions by this Board or Boards of other Divisions defining with any degree of certainty what constitutes

a 'continuing violation.' Perhaps, that is as it should be because the parties may not always have had a meeting of minds on such a definition as it applies to the numerous contracts containing this procedural provision."

The Awards cited by Carrier are distinguishable from the facts in this case. In Award 10423 the claim was based on an alleged failure to make a proper vacation relief assignment. We properly held that it was not a "continuing violation" because there "is only one vacation period just as there is only one job vacancy when an employee resigns . . . In both cases the assignment occurs once, although the consequences of such a violation by the Carrier may be a continuing one. It is not the continuing monetary liability, but rather the alleged wrongful assignment which determines whether a claim is a 'continuing liability'." In Award 11167 (Sheridan) the claim was dismissed because it was "based upon a specific act which occurred on a specific date." We dismissed the claim in Award 11505 (Dorsey) because there was no proof that the Carrier received the letter presenting the claim within the 60 day period. For the same reason, we denied the claim in Award 11568 (Sempliner). The claim in Award 10532 (Mitchell) was dismissed because no claim for the abolishment of the position, which occurred on December 30, 1954, was presented until March 5, 1955.

Here we have a claim based upon an alleged violation of Rule 21 of the Agreement. While express commissions were discontinued on May 16, 1957, Rule 21 provides that "prompt adjustment of the salary affected shall be made conforming to rates paid for similar positions." Whether or not an adjustment was appropriate can be ascertained only from a comparison of similar positions. This claim involves the question of a proper salary which, by its very nature, is a continuing claim. The fact that the proper salary can be determined only by comparing rates paid for similar positions does not alter the fact that it is a continuing claim.

Carrier also contends that the claim should be dismissed because the Claimants are unnamed as required under Rule 23. We have consistently held that Claimants need not be named if they are so described that they are readily identifiable and easily ascertained. The claim is in behalf of Agent-Telegraphers at Swaledale, Iowa, Meservey, Iowa, and Somers, Iowa. They are readily identifiable and easily ascertained.

Petitioner presented the claim in a letter dated October 26, 1957. In that letter Petitioner said, in part:

"Express commissions are discontinued at the named stations resulting in decrease in compensation for these positions. Manning, Iowa is similar position and rate should be adjusted in accordance with the Agreement, i.e., as claimed above."

Carrier replied on November 29, 1957 that "these stations are still express agencies." Petitioner wrote Carrier on December 11, 1957 that the stations were not express agencies as claimed. In a letter dated February 5, 1958 Carrier replied the claim is barred because of the Time Limit Rule and continued, in part, as follows:

"In any event, a check of express commissions received by claimants at these three stations for period of one year prior to instigation of this claim has disclosed same averaged approximately \$2.00 for

month or a little over 1 cent per hour of time actually worked by claimants; whereas, claim contemplates an increase of from 3.6 cents to 4.8 cents per hour. In other words, claim contemplates that claimants will receive greater compensation for not handling express than they received handling express, i.e., more money for less work, which certainly isn't contemplated by the governing rules."

At no time, on the property, did Carrier present similar positions for determining an adjustment of salaries at the involved stations as required in Rule 21. Only in its Ex Parte Submission did Carrier first submit evidence that the position at Hansell was comparable with the positions at Somers and Swaledale and that the position at Readlyn was comparable with the position at Meservey. This information was, undoubtedly, available to Carrier while the claim was handled on the property. We may not now consider such evidence.

Petitioner has met the burden of proving that the position at Manning, Iowa, is similar to the positions at Swaledale, Meservey and Somers, Iowa.

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 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 Carrier violated the Agreement.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1964.