Award No. 13164
Docket No. TE-12094

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE & OHIO RAILWAY COMPANY
RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake & Ohio Railway (Chesapeake District) that:

(1) The Railway Express Agency, Inc. violates and continues to violate the existing agreement between the parties when it fails and refuses to compensate G. L. Gentry, Agent, Lee Hall, Virginia, an amount equal to ten (10) percent commission on all express business handled in accordance with the provisions of said agreement; and

(2) Agent G. L. Gentry shall now be compensated in the amount of $652.10, representing commission due for the months of January through October 1958.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof. This dispute is primarily based on an agreement between The Order of Railroad Telegraphers and the Adams Express Company (antecedent to The Railway Express Agency, Inc.) dated September 1, 1916.

Lee Hall, Virginia is a station on the Chesapeake & Ohio Railway. There is at this location a position of agent under the agreement between The Order of Railroad Telegraphers and the Chesapeake & Ohio Railway (Chesapeake District). This is what is known as a joint agency, in that the agent is also agent for The Railway Express Agency, Inc. The rail carrier (C&O) is the general employer and the employe acquires the position under the terms of the agreement between The Order of Railroad Telegraphers and the rail carrier. Having thus acquired the position, he automatically becomes the agent of The Railway Express Agency and subject to the rules governing joint agents. Both the rail carrier and the Express Agency are made parties to this dispute because of the joint interest. Future reference in this submission to the "Carrier" will mean either or both.

This dispute concerns payment of express commissions. The controlling agreement provides for payment of a commission at the rate of ten (10) per-

OPINION OF BOARD: The question on the merits is whether a joint agent is entitled to a commission from the Railway Express Agency on the non-domestic portion of an international shipment of goods.

On the procedural side, the REA maintains that this Board does not have jurisdiction of the dispute because the agent is not an employe of REA and no agreement exists between the Order of Railroad Telegraphers and the Agency.

We are not persuaded by the Agency's argument on jurisdiction for the reasons contained in Award 298 (Hotchkiss) which was successively sustained by the Board in Award 548, by the Federal District Court in 55 F. Supp. 319, by the Circuit Court of Appeals in 137 Fed. 2d 46, and by the Supreme Court in 321 U. S. 342.

REA may believe it has one more arrow in its quiver for it seeks to distinguish this case on the grounds that the organization acted inconsistently with its position that an agreement existed between the parties by not objecting to a number of separations or discontinuances of joint agencies which it could have done under the agreement, if it existed, since such action requires mutual consent.

Aside from the fact that the Agency did not specify such separations or discontinuances on the property and thereby did not give the organization a chance to rebut the implications, the Board cannot put a premium on filing claims or exercising the right to object as evidence whether or not an agreement exists.

Under all the circumstances, we think the actual working relationship of the joint agents and the Agency was that of employer-employe.

As was said in Award 298:

> "agents are primarily employes of the particular railway on which they work and, secondarily employes of the Railway Express Agency Inc. whom they serve."

This conclusion is supported by the Agency's own description of its relation to the railroads and by the provision on "Employes" in the Standard Express Operations Agreement between REA and the railroads.

In the record of this case the Agency states:

> "In short, as the name indicates, Railway Express Agency is the agent of the railroads for the conduct of the rail express business."

Article 12 of the Standard Express Operations Agreement entitled "Employes" provides in Section 1 that:

> "The Express Company may arrange with the Rail Company for station and train employes of the Rail Company to act as agents and express messengers of the Express Company and to handle express at railroad stations, subject to the rules of the Express Company . . . such employes being elsewhere in this Agreement **referred to as joint employes." (Emphasis ours.)**

Section 2 of this same article provides that:

> "All of the agents and employes of the Express Company while on the premises or on the lines of the Rail Company, shall at all times conform to the general rules of the Rail Company then in force thereon . . ."

If REA is the agent and the C & O Railroad is the principal, which is admitted; and the agency contract between those two companies identifies a joint agent as a joint employe, as it does; and the agency contract makes joint employes subject to the general rules of the C & O, which it does; and The Order of Railroad Telegraphers has a wages and work rules agreement with the C & O, which it does; and each of these parties, separately, is under the jurisdiction of the Railway Labor Act, as they are; under simple agency law we think it is inescapable that this Board has jurisdiction of disputes on commissions between the joint employe and the railroad or the Agency in their joint or several capacities.

For the same view see Award 298, where the Board held that:

> "The salient fact is that the express commissions are inextricably interwoven with the wages which railways contract to pay agents. It must, therefore, be held especially in view of the close property relationships between the railroads and the Express Agency, Inc. that the Railway by which an agent is primarily employed and the Railway Express Agency Inc., by which he is secondarily employed, are jointly and severally obligated to maintain the wage structure of agreement, insofar as express commissions are found to be an essential factor in determining the wages to be paid by the railway."

See also Award 387 (Sharfman) where the railroad was made sole party respondent on an REA commission dispute. The claim was sustained.

If the REA could show that some other specific agreement to the contrary had been made with the agent it might be found that an employer-employe relation did not exist. In this respect, REA contends that the agent is an independent contractor who handles express under an individual agreement with the Express Agency "which, while not in writing" by custom and practice applied over the years, sets the terms and conditions for the handling of express. The absence of a formal instrument to support the contention that the agent is an individual contractor undermines the carrier's position, especially since the Old Adams Express agreement which was a formal instrument between the parties, gave full status to the agents as joint employes of the railroad and the agency.

It may be that the action of the Director General in 1918 (during government control of the railroads) dissolving the Adams Express Co., and establishing a more consolidated and comprehensive express agency, interrupted the formal relation between the agents and the agency. We think, however, the better view is that such formal relation was not dissolved but rather that the Old Express Company was absorbed by the new. As evidence of this, the Interstate Commerce Commission approved and authorized the application of the American Express Co., (the immediate predecessor of the REA) for:

> "the consolidation of the express transportation business and property devoted to that business of the American Express Company, the

Adams Express Company, Southern Express Company and Wells Fargo and Company and the consolidation of said four companies so far as said business and property are concerned."

In any event, we think that claimant is a joint employe of the railroad and the Agency and he may bring his claim to this Board either against the railroad or the Agency, or both, as he had done. We agree specifically with the views of the Board in Award 298 that:

> "From whatever point of view regarded, the relationship between any given Railway, The Railway Express Agency, Inc., and the joint agent who works on that railway, is a triangle no side of which can be removed or weakened without considering what the result will be to the other two sides.
>
> If this Board is legally empowered to clarify the respective rights and responsibilities of the parties to this three cornered arrangement, it will probably be better in the long run for all concerned to have that done than it will for them to be continuously involved in needless disputes. . . .
>
> As long as a railway company and the Railway Express Agency, Inc., are in a position to shift responsibility back and forth they will be under strong pressure to do so with the result that the purposes of the amended Railway Labor Act, in respect to this three cornered relationship, will be impeded."

We think this Board is legally empowered to clarify those respective rights and responsibilities and should do so, if there is no alternative. But we think, as did the Board almost 30 years ago, it would be much better if the Railway Express Agency would quit dodging its responsibility and either accept it or clarify the relationship of the parties through negotiation.

On the merits, the claim must fail. The employes rely on Article 2 of the Adams Express Agreement (accepted as applicable here) which provides:

> "A commission of ten (10) percent will be paid agents on all Adams Express business handled."

The language is so clear and unambiguous, the employes say, that no amount of contrary practice will change the fact that the agent is entitled to a commission on all express business. In their view, that part of the international shipment of goods between Germany and New York was just as much express business as that part of the shipment from New York to the claimant's station in Virginia.

The most telling evidence in support of this conclusion is that REA admits a through Bill of Lading is used on these international shipments "to give Railway Express Agency the opportunity to participate in the handling of international shipments from a competitive standpoint." It certainly is logical to reason that if REA would lose the profitable domestic segment of the shipment if it did not give through service to the shipper from point of foreign origin to point of domestic destination that the foreign portion of the shipment meets the test of "express business handled."

The claim should be denied, however, because this result apparently was not intended when the original Adams Agreement was negotiated. More

importantly, the carrier asserts, and it is not refuted by the employes, that never once since the agreement was negotiated in 1917 have commissions been paid on the foreign portion of the shipment. The carrier states:

> "These charges are not Railway Express Agency charges but represent sums paid by Railway Express Agency to the foreign and ocean carriers for the services such carriers provide in transporting the shipments across the ocean and within the foreign country. Such charges are known as advance charges and throughout the many years of the existence of a rail express transportation business in the United States, commission agents have not taken commission on advance charges."

This practice of many years standing serves to explain what was intended by the phrase "express business handled." The term is not so unambiguous as to justify disregarding whatever meaning has been given to it from the time it came into operational effect. Therefore the claim should be denied.

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 the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1964.

CARRIER MEMBERS' CONCURRENCE AWARD 13164
DOCKET TE-12094

For reasons stated in the record and in the memorandum which the Carrier Member submitted to the refree during the panel discussion of this claim, the claim should have been dismissed on jurisdictional grounds.

G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian
W. M. Roberts