

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Arthur M. Millard, 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 on Seaboard Air Line Railway that:

"1. The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of Aug. 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

"2. That the minimum amount of commission of ten dollars (\$10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of Aug. 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent and that these agents be retroactively reimbursed in the amount of the differences that should have been paid under the express agreement.

"3. That all transfer allowances established by Article 3 of the Express Agreement of Aug. 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Monticure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

STATEMENT OF FACTS: In their ex parte statement the employees submitted the facts as follows:

"An express agreement, revised as of Aug. 1, 1917, was duly executed between the Southern Express Co. and the General Committee of The Order of Railroad Telegraphers in behalf of the joint railway-express agents on Seaboard Air Line Railway. The agreement governed the rules and rates of commission and transfer allowances for the joint agents on the Seaboard Air Line Railway, and was in effect when the Southern Express Co. was succeeded by the American Railway Express Co. and later by the Railway Express Agency, Inc., which companies assumed all contracts of their predecessors.

"Beginning in the year 1930, the Railway Express Agency, Inc., arbitrarily, or through individual agreement with the joint agent, reduced the commission and transfer allowance at numerous agencies in violation of Articles 2, 3 and 14 of the Express Agreement, and arbitrarily established a flat commission rate on carload shipments by express of \$5.00 per car in violation of these articles.

those rates today, but it is no more true of the southeastern section of the country than it is of New England, if you like. 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, but we never did assent to the assumption of that contract, and when we were asked to revise it so notified the organization.'

"The continuation of the commissions at the same rate was not because of the agreement between the Southern Express Company and its joint agents, it was the only action which could be taken from a practical standpoint; the commissions varied in different sections of the country, the only feasible workable thing to do was to continue those commissions in effect unless and until investigation developed that some other action should be taken as to all of them or some of them. That is exactly what has happened. Thereafter, from time to time, revisions have been made in the rate of commissions paid to joint railroad-express agents, and in the transfer allowances, and those revisions have been upward as well as downward, dependent upon business conditions.

"In conclusion we repeat that Railway Express Agency never has entered into an agreement with The Order of Railroad Telegraphers, and that it has not assumed the agreement between the Southern Express Company and its joint agents, and the complainant herein repeatedly has been so advised by Railway Express Agency, and long prior thereto by American Railway Express Company."

OPINION OF BOARD: The original contentions of the Railway Express Agency, Inc., hereinafter termed the carrier, that this Third Division of the National Railroad Adjustment Board was without jurisdiction insofar as it pertained to the consideration and handling of this claim, have been fully determined by Award Number 298 of this Division, rendered on September 17, 1936, and in which the contentions of the carrier were overruled. The Board reaffirms the decisions and rulings with respect to the jurisdiction of this Third Division, and Award Number 298 is made a part of this record, and the issue now before the Board is solely with respect to the merits of the claim.

The dispute at issue represents a claim of the General Committee of The Order of Railroad Telegraphers for the restoration of the former commission rates and transfer allowances, paid to joint railway-express agents or agencies on the Seaboard Air Line Railway by the Railway Express Agency, Inc., and which were reduced by the Express Agency effective April 1, 1930. A further issue of claim is for the retroactive reimbursement to such agents or agencies for the difference in the amounts paid or the monetary loss sustained by reason of the reduction in express commissions and transfer allowances.

In support of their contentions in this dispute the General Committee submits that an agreement was entered into by the Southern Express Company on August 1, 1917, with a Committee of the Order of Railroad Telegraphers, in behalf of the joint railway express agents, and pertaining to rates of pay, rules and regulations for such agents jointly employed as Railway and Express Agents on the Seaboard Air Line, and that such obligations passed on to the successor companies of the Southern Express Company.

The General Committee further contends that this agreement continued to be assumed by the successors of the Southern Express Company until April 1, 1930, when the Railway Express Agency, Inc., violated Article 14 of the agreement between the parties by reducing the rates and making individual agreements with certain of the joint agents without conference and agreement with the General Committee.

The carrier contends that the agreement of the Southern Express Company was never assigned to or assumed by its successor companies; and that this "document" or agreement signed by "D. May" for the joint agents was not executed by a committee of the Order of Railroad Telegraphers.

The carrier further contends that in lieu of establishing an exclusive agency at Lawtey, Florida, it was justified in making an independent agreement with the joint railway express agent at that point, as well as in making independent individual agreements at other points, and bases its contentions on the statement that the Railway Express Agency, Inc., had never entered into an agreement with the Order of Railroad Telegraphers and that it had or has not assumed the agreement between the Southern Express Company and its joint agents.

From the voluminous mass of correspondence, exhibits, and argument submitted in this case, both as they apply to jurisdiction and merits, the principal dispute now at issue is the agreement between the Southern Express Company and the joint railway-express agents or agencies, and the making of independent agreements with joint agents of the Railway-Express companies.

On that subject the Board agrees with the Opinion of the Referee in Award Number 298 that "the practice by which railroad agents are paid commissions for services performed for companies other than their principal employer, the particular railroad company, is sufficiently general to be regarded as a part and parcel of the system under which industrial relations on American Railways are conducted."

In these joint agencies that are established the Railroad is the primary and governing employer and the Express Agency is the secondary employer, and there is little or no doubt but that the compensation or wages paid by the carrier to the joint agents affected are predicated upon an estimate, knowledge or reasonable assumption of the express commissions or allowances the joint agents receive from the performance of those duties incident to their work which are performed for the Express Agency; and when reductions are made in express commissions or allowances without an adjustment being made in the railroad compensation, the entire fabric upon which the wage structure or basic rates are founded is disturbed. It is upon these facts that the Referee in Award 298 correctly bases his statement that a triangle is established, no side of which can be removed or weakened without considering what the result would be to the other two sides. These facts are fundamental in the relationship between employer and employe, and in this, as in other disputes of the same character, the Board submits its unqualified opinion that if or when a change is contemplated or to be made in which the basic structure or rates are to be affected, such change should only be made after conference, negotiations and agreement between the parties at issue.

In the instant case the original agreement was made between the express company and the joint agents, but in permitting the express company to reduce the basic rates, without conference, adjustment and agreement, which was undoubtedly done with the concurrence of the Railway Company, a responsibility rests upon the Railroad Company as clearly as if it had reduced the railroad salary of the agents affected by unilateral action.

In considering the contentions of the carrier that the agreement of August 1, 1917, made for or between the joint agents by the Southern Express Company, was never assigned to or assumed by its successor companies, and that the agreement signed by D. May for the joint agents was not executed by a committee of the Order of Railroad Telegraphers, the Board submits with respect to the latter contention, that the status of the signer of the agreement is not an issue of particular importance, as the fact that the agreement was made and signed, that its terms were put into effect, that the joint agents in whose interests the agreement was made are covered by the telegraphers agreements, and that the Order of Railroad Telegraphers has long been and is now the acknowledged and authorized representative of agents in their dealings with carriers, is ample evidence that the agreement made was an authentic contract existing between the parties.

As for the agreement made with the Southern Express Company, the question of whether the agreement was specifically assigned to its successors

is not an especially important one. The fact is that an agreement between the parties was made and ratified and which in addition to specifying rates of commission and transfer allowances to the joint railway-express agents or agencies affected, specifically provided in Article 14 that no change would be made in the agreement until after thirty days' written notice.

From the making of that agreement in 1917 until in 1930 when the carrier reduced the commission rates and transfer allowances without conference and negotiation with the General Committee representing the joint agents, the agreement continued in force and was observed by both the General Committee representing the agents or agencies and the respective successors of the Southern Express Company, and the facts are evidenced that the rates, rules, and requirements of that agreement did not expire with the change of ownership, management, or operation of the carrier, but has continued to exist as a contractual agreement between the two parties until changed in the manner provided in the agreement.

During the period in which the contractual agreement was operative the carrier had ample opportunity for conference and agreement with the General Committee representing the joint agents as to any contemplated change or conditions specified in the agreement. Undoubtedly the Railroad Company, as the primary employer of the agents affected, was fully aware of the existing agreement, as the commission rates and allowances constituted a factor in determining the rate structure or basic rates paid the agents for the services performed for the Railroad Company, and as the changes in the commission allowances could not have been made without the concurrence of the Railroad Company, so would the knowledge of the existing agreement have been a matter of joint understanding and discussion had there been any doubt as to its existence and validity.

However that may be, from the facts introduced the Board concurs in the opinion rendered in Award No. 298, which is a part of this record, that in the light of an instrument which over a long period of years was regarded as an agreement between the joint agents and the Southern Express Company, and which specified definitely how it could be terminated, the instrument was an agreement establishing an employer-employee relationship, and in the observance of the terms of that agreement over a period of years by the successors of the Southern Express Company and the facts herein submitted, there was no doubt as to the knowledge of an existing agreement between the parties, and no basis upon which such agreement could be abruptly terminated, or the carrier relieved from the responsibilities of an existing employer-employee relationship and agreement by ex parte action.

With respect to the making of agreements with individual agents, and without questioning the various legal citations submitted by the carrier, the Board submits that the Railway Labor Act did not and does not compel agreements between parties, the facts are, however, that in the conditions of the instant case an agreement exists and did exist in which the joint agents making individual agreements with the carrier, had previously made an agreement with the representative of the Order of Railroad Telegraphers, and so long as they were parties to that agreement they were bound by it, and so long as that agreement was in force any agreement subsequently made which was at variance with that original agreement was void unless the original agreement had been removed or voided by the same process as when it was made.

In other words, in the claim at issue the facts are evidenced that the joint railway-express agents on the lines of the Seaboard Air Line Railway were working under a collective agreement which had been properly negotiated between and ratified by the carrier or the Express Company, and its successors, and the organization of which they formed a part. So long as these joint railway-express agents were employed by the carrier in such capacity, they were working under the rules of that agreement and were bound by its specifications and requirements; and any other supplementary

individual agreement or contract made or entered into that would in any manner change or modify, invalidate or set aside, or that was at variance with the rates, rules, and requirements of that agreement, was invalid and a violation of the principles of that agreement unless negotiated and ratified between the principals of the original agreement.

Under the conditions outlined and the facts in evidence, this Division finds that the contract of agreement of August 1, 1917, was an agreement between the Order of Railroad Telegraphers and the Southern Express Company and which was in turn assumed and observed by its successor companies, and that no notice having been served by either of the parties to change or terminate such contract under the terms of Article 14 thereof, that the contract remains in force and effect.

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 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 action of the carrier, or Railway Express Agency, Inc., in reducing the commission rates and transfer allowances without conference and agreement was a violation of the existing agreement between the parties.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois, this 15th day of December, 1937.

DISSENT

Dissent is registered to this award for these reasons:

First—The respondent party, the Railway Express Agency, Inc., never entered into any agreement with the petitioner relating to the matters involved in this claim.

Second—The respondent, though succeeding the American Railway Express Company which had previously acquired certain business of the Southern Express Company, did not assume, but in fact disclaimed, the agreement between the Joint Agents and the Southern Express Company effective August 1, 1917. The award is in error in declaring that the agreement of August 1, 1917, "was an authentic contract existing between the parties" to the instant dispute.

Third—The award thus disregards the basic requirement for establishment of a legal contract and arbitrarily declares a contract to exist; it then proceeds to further error by ignoring the conditions existing in respect to carload express shipments, a major element and specification in the claim in dispute. Carload express business could not have been subject of the original

agreement between the Joint Agents and the Southern Express Company, which this award declares to be in current existence between the present parties to this dispute, and could not be handled by either the Southern Express Company, the American Railway Express Company or the Railway Express Agency, Inc., by reason of their succeeding contracts with the Seaboard Air Line Railway which reserved to the latter the right to handle all transportation of such carload shipments.

Fourth—The imputation that the agreement with the individual agent at Lawtey, Florida, was at variance with the original Joint Agents—Southern Express Company Agreement, which is carried in the declaration in the "Opinion of Board" by the referee, that any agreement made with an individual one of the joint agents who were bound by the original agreement between the Joint Agents and the Southern Express Company was void because of variance with that original agreement so long as the latter was in force, is not supported by the evidence in the record. The rate of commission on carload express shipments at Lawtey, Florida, was established by individual agreement between the respondent and the joint agent at that point; that individual agreement was not at variance with the original agreement between the Joint Agents and the Southern Express Company even though the latter may be arbitrarily enforced upon the respondent, the Railway Express Agency, Inc., because the carload express business, by contract between the express companies here involved and the Seaboard Air Line Railway having been reserved to the latter, was not existent for the Southern Express Company to negotiate upon with the Joint Agents.

Fifth—The denial of the right to individual contract between the respondent and an individual agent such as the joint agent at Lawtey, Florida, under the circumstances of this case, which did not controvert any other agreement actually in effect, is a denial of the constitutional right of the parties as specifically stipulated in recent decision by the Supreme Court of the United States, stating that the provisions of the Railway Labor Act do not prohibit a carrier from "entering into such contract of employment as it chooses with its individual employees." The transgression of constitutional rights of individuals by an award of this character from this quasi-judicial board may not be accepted without fear of destruction of inalienable rights.

C. C. COOK.
J. G. TORIAN.
A. H. JONES.
GEO. H. DUGAN.
R. H. ALLISON.