

**Award No. 1123**

**Docket No. TE-1122**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**I. L. Sharfman, Referee**

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**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS**

**BOSTON AND MAINE RAILROAD**

**STATEMENT OF CLAIM:** "Claim of General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad that Joint Railway-Express Agent L. P. Leith of Rockingham, N. H., be reimbursed to the amount of express commissions accruing to the joint agency on April 19, 1939, under the provisions of the sixth paragraph of Rule 14, and the first and second paragraphs of Rule 18 of Telegraphers' Agreement."

**JOINT STATEMENT OF FACTS:** "An agreement bearing date of March 18, 1927, containing rules, working conditions and rates of pay was in effect at the time of this claim, that Agreement being between The Order of Railroad Telegraphers and Boston and Maine Railroad.

"The agency at Rockingham, N. H. is covered by said Agreement and L. P. Leith was regularly assigned Agent at this point at the time of the occurrence covered by this claim.

"Mr. Leith was also the Agent at Rockingham, N. H. for the Railway Express Agency, Inc.

"On April 18, 1939, Agent Leith was notified by the Superintendent of the Carrier that he was suspended from the service commencing April 19, 1939 on account of an alleged failure to observe Operating Rule No. 709 and Leith was directed to report at the office of the Superintendent at Dover, N. H., at 10:00 A. M., April 20, 1939 for investigation, accompanied by his representative. Later date of investigation was changed to be held at 10:00 A. M., April 19.

"Investigation was held and resulted in Agent Leith being found not at fault and he was returned to the service and to his regularly assigned position on April 20, 1939, and was paid for the eight (8) hours time lost to him on April 19, 1939, in accordance with the sixth paragraph of Rule 14, Agreement of March 18, 1927.

"The Organization, party to the Agreement of March 18, 1927, claims Agent Leith should also be paid the amount of express commissions accruing to the Agency on April 19, 1939, as provided by the first and second paragraphs of Rule 18, but claim for such express commission has been declined by the Carrier."

**POSITION OF EMPLOYEES:** "L. P. Leith is the regularly assigned Agent on the joint Railway-Express Agency at Rockingham, N. H. with assigned hours 7:00 A. M. to 3:00 P. M. His duties are those of joint Railway-Express Agent, Telegrapher and Towerman.

liminary work in connection with the carload of horses moving in express service.

"The claim of spare man Wilson was progressed through the regular channel and handled by the General Chairman of the Telegraphers' Committee with the Assistant General Manager, the committee urging the payment under Rule 17 of the Agreement of March 18, 1927 and agreed upon interpretation. After further efforts to have the two men settle the matter between themselves, which was unsuccessful, \$17.40 was paid to Mr. Wilson and similar amount was deducted from the pay of Mr. Leith.

"Attached as 'Carrier's Exhibit No. 1' is correspondence between the General Chairman, Order of Railroad Telegraphers and General Officers of the Boston and Maine Railroad regarding claim of Mr. W. F. Wilson, the spare man, who acted as Agent at Rockingham on April 19, 1939.

"Attention is respectfully called to the last part of letter from General Chairman of the organization to the Assistant General Manager of the Railroad dated August 15, 1939, wherein he says:

'We must insist that Wilson be paid, and if it is necessary to do so we will take up the Leith angle of this matter when it comes up.'

This very clearly shows that the Committee understood that if we paid Wilson we would take the amount paid to him away from Leith, therefore, the surprise expressed in letter of the General Chairman to Assistant General Manager, dated August 29, 1939 (See Employee's Exhibit 'A') is not genuine. He knew what was coming and precipitated the action of the management by insisting on the payment of Wilson, the spare man.

"The wages lost, as mentioned in the sixth paragraph of Rule 14, and the compensation to be allowed, as mentioned in the first paragraph of Rule 18, refer only to wages and compensation paid directly by the Railroad, and do not refer to anything in the way of remuneration which an employee of the Railroad may receive for the handling of express, acting as postmaster, or doing numerous other things which men covered by this agreement are known to do in addition to acting as Agent for the railroad.

"The real question to be decided by this Adjustment Board is whether or not there is any requirement by rules of the agreement of March 18, 1927, which requires that two men shall be paid express commissions for work in connection with the handling of a car of horses in express service at Rockingham, N. H., on April 19, 1939.

"The carrier urges that there is no such requirement by rule. That the proper commission has been paid, and to the man whom the Committee insisted should have it."

**OPINION OF BOARD:** The evidence of record clearly establishes the following: that the claimant was a joint railway-express agent; that he was kept out of service on April 19, 1939 through no fault of his own; that the carrier recognized its responsibility for the wage loss incurred by the claimant and made good the loss of the day's wages; that the carrier deducted from the claimant's wages the amount of express commissions (\$17.40) accruing to the agency for that day which the claimant had retained; and that the carrier declines to recognize any obligation to the claimant for the express commissions involved.

It is true, of course, that the express commissions were paid to the extra man employed while the claimant was attending the investigation on April 19; but it is also true that a day's wages were paid to the extra man. Both of these payments were made in conformity with the requirements of Rule 17 of the Agreement, which provides that "spare employees . . . will receive the compensation of the position to which assigned, together with proportion of commission earned" (the latter phrase being authoritatively

interpreted to mean "the total commission on the day or days that the spare man covered the position"). The real issue is whether the claimant is entitled to express commissions as well as wages for the day he was kept from work because of the investigation.

As a matter of equity, and entirely apart from the rules of the Agreement, there appears to be as strong a basis for the carrier's making good to the claimant the loss of commissions as the loss of wages. Otherwise, the burden or loss resulting from the carrier's act of holding the claimant out of service for the purpose of investigation, at which the claimant was found to be not at fault, would be imposed upon the innocent party rather than upon the party responsible for the added burden or loss. This consideration is especially pertinent where, as here, a close relationship obviously subsists between railway wages and express commissions in connection with joint railway-express agencies. No reason has been adduced, other than a technical interpretation of the governing rules, for restricting the redress of the claimant to the wage loss, instead of making him whole for all compensation of which he was deprived as a result of the carrier's action.

In point of fact, however, there is ample basis in the rules themselves for sustaining the claim. Rule 14 (dealing with Discipline and Grievances) contains the following provisions: "If the final decision decrees that charges against the employe are not sustained, the records shall be cleared of the charge: if suspended or dismissed, the employe will be returned to former position and paid for all wages lost less amount earned in any other service." Assuming that this rule confines itself to the wage loss, Rule 18 (dealing with Attending Court, Investigation, Examinations), which clearly and precisely applies to the facts here involved, embraces by its language express commissions as well as railway wages. It specifies, in effect, that employes attending investigations, except where they are found to be at fault, "will be allowed compensation equal to what would have been earned had such interruption not taken place." The circumstances of this proceeding provide no basis for according to this provision any other than its plainly comprehensive meaning.

**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 employe involved in this dispute are respectively carrier and employe 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 evidence of record discloses a violation of Rule 18 of the Agreement.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 14th day of June, 1940.