

Award No. 1257

Docket No. TE-1257

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Atchison, Topeka & Santa Fe Railway that, the carrier is violating the terms of the Telegraphers' Agreement by requiring employes covered by said agreement at Lamy, New Mexico, and at Ottawa Junction, Kansas, to perform express transfer service to the Railway Express Agency, Inc., without payment to the employes by the Railway Express Agency, Inc., of appropriate compensation for such service; that such appropriate compensation to the individual employes involved shall be determined by conference and mutual agreement between the Carrier, the Railway Express Agency, Inc., and the Organization, and the Carrier shall cause the Railway Express Agency, Inc., to pay such agreed compensation to the employes involved retroactively to the date such express transfer service has been required of them or pay the employes direct the amounts due them; and that if the Carrier elects to continue to require these employes, or any of them to perform such express transfer service, it shall cause the Railway Express Agency, Inc., to pay the mutually agreed amounts to the employes performing the express transfer service."

EMPLOYES' STATEMENT OF FACTS: "An Agreement last revised as of December 1, 1938, as to rules and rates of pay is in effect between the parties to this dispute.

"The positions of agent and the telegraphers at Lamy, N. M., on the New Mexico Division, and the agent-telegrapher at Ottawa Junction, Kansas, on the Eastern Division are covered by said agreement.

"The Railway Express Agency, Inc., a common carrier under the Interstate Commerce Act, is a railroad-owned joint facility engaging in express transportation and acting in fact as the exclusive agent of the Atchison, Topeka & Santa Fe Railway for the conduct and transaction of its express transportation business on all of its lines, as set forth in the Express Operations Agreement between these two Carriers.

"The Express Operations Agreement in effect between the Rail Company and the Express Agency specifically exempts the Rail Company from the performance of express transfer service between its trains, or between its trains and trains of a foreign carrier, or between its trains and any other transportation agency, at any station on the lines of the Carrier.

"Lamy is an express transfer point between trains of the Carrier and the trucks of the Hunter-Clarkson, Inc., a bus and truck line, as established by the Railway Express Agency, Inc.

"The Carrier voices the opinion that the time of the Board should not be taken up with so trivial a matter as the performance of the transfer of occasional express shipments from one train of the Carrier to another train of the same Carrier and an expenditure of time in so doing which averages not to exceed two minutes per day but that if the Board does see fit to assume jurisdiction and a hearing is held the Carrier requests an opportunity for oral hearing; and the right to reply to all matter presented by the employees.

"To complete the record, the Carrier appends as its Exhibit 'A' copy of letter of Mr. T. A. Gregg, Assistant to Vice-President of the Carrier, addressed to General Chairman J. L. Elliot, dated January 22, 1940."

OPINION OF BOARD: Lamy, New Mexico is an express transfer point between trains of the carrier and the trucks of the Hunter-Clarkson, Inc., a bus and truck line, as established by the Railway Express Agency, Inc., and Ottawa Junction is an express transfer point between trains of the carrier as established by the Railway Express Agency, Inc. At these two points employees of the carrier were required to perform express transfer service for the Railway Express Agency, Inc.

It is the contention of the General Committee:

"That the Telegraphers' contract of employment agreement governs the employment of agents and telegraphers in the employ of the Santa Fe Railway, and does not provide authority to or empower the Santa Fe Railway to unilaterally farm out, hire-out, or loan its agents and/or telegraphers to another carrier, the Express Agency, without their consent and without making prior agreement with the Organization, to perform express transfer service.

"That the Santa Fe Railway, without the consent of the employees and without making prior agreement with the Organization, is improperly and in violation of the terms of the Telegraphers' Agreement farming-out, hiring-out and loaning the agent and/or the telegraphers at Lamy, New Mexico, and the agent-telegrapher at Ottawa Junction, Kansas to perform express transfer service for the Railway Express Agency, Inc., and has refused the demand of the Organization that they be relieved of this work or cause them to be appropriately compensated for this service which they are being improperly compelled to perform."

The carrier states:

"There has been and is no violation of the Telegraphers' Schedule and this is supported by lack of any specific reference to any part of the schedule in its handling of this claim with the carrier and its presentation of the claim ex parte to the Board."

To show that the handling of express transfers is no function of the carrier or the duty of its employees, the General Committee cites Article 12 of the agreement between this Carrier and the Railway Express Agency, which is as follows:

"The Express Company shall load and unload express matter transported under this agreement, or require the shippers and consignees to do so."

This carrier does own the stock in the Railway Express Agency, Inc., and is entitled to the net earnings of the Agency on its lines. It is now being paid fifty dollars (\$50.00) per month by the Agency for the transfer service at Lamy, New Mexico.

The General Committee cites the Scope Rule and Article XV of the current agreement to support the employees' claim. Article XV reads as follows:

"EXPRESS AND TELEGRAPH COMMISSIONS

"When express or Western Union commissions are discontinued or created at any office, thereby reducing or increasing the average monthly compensation paid to any position, prompt adjustment of the salary affected will be made conforming to rates paid for similar positions in the same seniority district."

A mere casual reading of this rule shows that it only applies to commission earned by the Carrier's employees in handling the express for the Agency, which would affect such employee's total compensation: that is the pay earned from the carrier, his primary employer, and the commissions earned from the Agency, his secondary employer.

This rule now has no bearing on the rates paid by this carrier because in the year 1917, this carrier discontinued the allowance of commission and raised the salaries of the employees so affected to make up the loss of the express commissions. In other words, \$250,000. was added to the wages of employees covered by the Telegraphers' Agreement to compensate them for losses sustained on account of discontinuance of the express commissions.

As previously stated, Article XV of the agreement deals only with express commissions and does not deal with express transfers. Both parties have cited to this referee many awards of this Division and other Boards involving the duties of the employees, the carrier and the express agency. Many of them, however, have no direct bearing on the exact question before this Board.

In Award 507 of this Division we find the following:

"Insofar as the statement is made concerning written agreements, the Board submits that inasmuch as these commissions existed at the time the agreement between the parties was ratified, and that they had existed for some time previous to the ratification of such agreement, there is a sound basis for the conclusion that the original express commission paid before the reduction was a determining factor or means of arriving at a mutual understanding between the parties of the compensation to be paid by the carrier to the representatives of the joint agencies affected by the reduction made in the payment of express commission.

"In view of these conditions, the Board submits that the commissions paid by the Express Agency at the time the agreement was ratified formed as much a part of the compensation of the employees or agents affected as the figures written into the agreement for the railroad service, and in disturbing the basic rate upon which the agent's compensation from the Carrier was founded and by permitting the Express Agency to reduce the express commission without conference and negotiations, the Carrier violated the terms and principles of the existing agreement between the parties."

The same principle was enunciated in Award 522 of this Division in this language:

"With the conditions outlined in this instant claim, the Board submits that, as stated by the Carrier, an agreement was ratified between the Employees' Organization and the Carrier wherein a basic rate for the compensation of the agent at Bridgman was established and other conditions affecting the employees were agreed to, and these in the opinion of the Board formed as much a part of the compensation and working conditions of the employee as the rate and other conditions written into the agreement for the railroad service. The Board further submits that neither party to the existing agreement made between the parties may amend the rate which forms the basic structure of the employees compensation or any other condition of the agreement to permit such to be done by another interest, without

proper conference and negotiation between the parties; and in permitting the Express Agency to reduce the express commission and concurring in such reduction without conference and negotiations between the parties the Carrier violated the rules and principles of the existing agreement."

Similar quotation could be taken from Award 528.

This Board reaffirms the above quoted principles in Awards 507 and 522, and holds, as applied to this case, that the working conditions prior to the time the agreement was ratified formed as much a part of the working conditions as the rules in the agreement, unless the written rules of the agreement provide otherwise. Or to state it another way, where the written agreement is silent on a particular question, then the working conditions that governed prior to the effective date of the written agreement will govern with the same force and effect as the written provision of the agreement.

The record shows that at seven transfer points on the line of this carrier, its employes were paid for this transfer service, while at eleven other points on its line the Carrier's employes were not paid for the transfer service performed by them.

The effective date of the current agreement was December 1, 1938. Prior to that time the employe at Ottawa Junction did not perform any express transfer service there. He did not begin to perform this service until June 11, 1939. Certainly this service at that place was not taken into consideration when this agreement was ratified. The Board holds that he is entitled to compensation for express transfer service performed at Ottawa Junction or he should not be required to perform this service.

On the other hand, in reference to the claim at Lamy, New Mexico, the record shows that express transfer service was handled by the employes there since October 1, 1926. It must be assumed that that service was taken into consideration when the rates of pay for the employes at Lamy, New Mexico were negotiated. The Board is of the opinion that this part of 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 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 action of the carrier in reference to the claim at Ottawa Junction was in violation of the provisions of the prevailing agreement and that appropriate compensation to the employes involved shall be determined by conference and mutual agreement between the parties. Further, that there was no violation of the prevailing agreement at Lamy, New Mexico.

AWARD

Sustained as to the claim at Ottawa Junction. Denied as to the claim at Lamy, New Mexico.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of December, 1940.