

Award No. 1466

Docket No. TE-1457

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE NEW YORK CENTRAL RAILROAD COMPANY,
BUFFALO AND EAST**

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Buffalo and East, that the action of the Railroad Company in arbitrarily agreeing with, and permitting the Railway Express Agency, Inc., to arbitrarily remove without just cause the express agents from their positions of joint railway-express agents at Stamford, New York, Tannersville, New York, on November 1, 1937, Coxsackie, New York, on November 2, 1937, Brewster, New York, on or about November 10, 1937, and Hunter, New York, on November 16, 1937, without conference and agreement with The Order of Railroad Telegraphers was improper and in violation of the Telegraphers' Agreement and the Memorandum of Conference of June 26, 1926, on Express Commissions at joint agencies; that the agents at Stamford, Coxsackie and Brewster shall be restored to their express agency positions and be reimbursed retroactively to the date they were arbitrarily removed in the amount of express commissions they would have earned had they not been arbitrarily removed; and that the agent at Hunter, who was restored to his express agency effective January 1, 1938, and the agent at Tannersville, who was restored to his express agency effective May 5, 1938, be each reimbursed in the amount of the express commissions they would have earned during the period of time they were arbitrarily held from their express agency positions."

EMPLOYES' STATEMENT OF FACTS: "An agreement as to rates of pay and rules of working conditions is in effect between the parties to this dispute.

"A Memorandum of Conference bearing date June 26, 1926, as to express commissions at joint agencies is also in effect between the parties to this dispute.

"The joint railway-express agencies at Stamford, New York, Tannersville, New York, Coxsackie, New York, Brewster, New York, and Hunter, New York, involved in this dispute, are covered by these Agreements.

"Effective November 1, 1937, at Stamford and Tannersville; November 2, 1937, at Coxsackie; on or about November 10, 1937, at Brewster; and November 16, 1937, at Hunter, the New York Central Railroad Company arbitrarily agreed with, and permitted the Railway Express Agency, Inc., to arbitrarily remove these agents from their respective express agent positions without just cause, thereby arbitrarily reducing the average monthly compensation of these agents in the amount of the express commissions they would have earned had they not been thus removed.

"Award No. 908 was also cited in the Assistant General Manager's letter of March 7, 1940, previously referred to. Excerpts from the Opinion of Board are contained in that letter. The article of the agreement which is referred to in those excerpts is substantially the same as our Rule 18. In Award No. 908 the Board said of that rule—

'This Article of the Agreement in no way makes the carrier liable for Western Union Commissions. It simply provides that when such commissions are discontinued "prompt adjustment of the salary affected will be made conforming to rates paid for similar positions." The only claim the employe may make against carrier under this rule of the agreement is for an adjustment of the compensation paid him by carrier when Western Union Commissions are discontinued.'

CONCLUSION

"The claim of the employes in this dispute should be denied for the following reasons:

"1. The removal of the express work from the five agencies involved was in accordance with past practice in numerous previous instances.

"2. This action on the part of the Express Agency in no way infringed upon any rule of the agreement between the railroad company and its telegraphers.

"3. There is no agreement, understanding or obligation which binds the carrier to reimburse the employes for loss of commissions.

"4. The agents did not handle express business during the periods involved in the claim and they are, therefore, seeking commissions on business which they did not handle.

"5. Regardless of whether the discontinuance of express commissions resulted from an act of the railroad company or the Express Agency, the employes must necessarily show a contractual obligation of one party or the other to continue paying express commissions after such discontinuance.

"6. There is no contractual obligation other than Rule 18 under which the telegraphers' committee can claim adjustments in these circumstances.

"7. Rule 18 definitely applies in these circumstances and the carrier has been willing at all times to dispose of this dispute in accordance with that rule. (See last sentence of management's letter of Dec. 28, 1937, to General Chairman Morey.)"

OPINION OF BOARD: In October, 1937, the Railroad Company's agents at Stamford, Tannersville, Cossackie, Brewster, and Hunter, N. Y., were joint railway express agents, that is, in addition to being employed by the carrier, each station agent was employed by the carrier through the medium of its agent, the Railway Express Agency, Inc., as express agent at his respective station. They were allowed commissions for handling the express business, and, in addition, they received from the Railroad Company a specified hourly rate.

It is the claim of the employes that during the month of October, 1937, express route agents and express travelling auditors of the Railway Express Agency, Inc., were sent to interview merchants in towns and villages along the New York Central Railroad with the view to employing them to serve as express agents in place of the railroad station agents, and particularly was this done at the stations named in this claim. About this time the joint railway express agents at the stations named were visited by the express route agents who informed them that they were to be relieved immediately and supplemented by merchants in their locality. It is the contention of the employes that, when the reason for such action was requested, the route agent responded that it was being done because of "activity of The Order of

Railroad Telegraphers in demanding an agreement with the Railway Express Agency, Inc., to govern the employment and compensation of all joint railway-express agents in the United States, and in incorporating in such demands, unreasonable requests upon the Express Agency."

There is no claim made that the agents did not properly perform their work nor is there any claim made that it was an economy move because the same commission paid to the agent was paid to the local merchant. On the following dates and at the following stations the agents were relieved of the work of handling the express, and the commissions they formerly received for this work were discontinued.

Nov. 1, 1937, at Stamford and Tannersville

Nov. 2, 1937, at Cossackie

On or about November 10, 1937, at Brewster

Nov. 16, 1937, at Hunter

On January 1, 1938, the handling of the express business was restored to the Railroad Company's agent at Hunter, while on May 5, 1938, a similar restoration was made at Tannersville. In both instances, on the same basis as before, they were paid commissions for handling the express but without reimbursement of express commissions during the time they were relieved. On February 21, 1940, the Kaaterskill Branch, on which Tannersville and Hunter are located, was abandoned, which resulted in the abolishment of the positions of agents at those stations.

It is the contention of the employees that the Railroad Company agreed with, and permitted the Railway Express Agency to remove arbitrarily these agents from their express agencies at the stations named in this dispute; that this places the responsibility for their removal on the Railroad Company; that this matter was called to the attention of the officials of the New York Central Railroad Company yet nevertheless it permitted the removal of the express work at the stations named.

The New York Central Railroad Company contends that the Railway Express Agency, Inc., is only the agent of the company and other railroad parties to the express operation Agreement; that the Railroad Company is not the responsible party in this dispute. We can see no reason for a lengthy discussion of this proposition for time and again this Division has held opposite to the contention of the Railroad Company. Early in its history this Division in Award 297 said:

"For the purposes of this Act, it appears clear that agents are primarily employees of the particular railway on which they work, and secondarily, employees of the Railway Express Agency, Inc., whom they serve. Legal definitions aside, they serve year in and year out as agents of the Express Agency, and it is not vital to the issues involved whether they are called employees, functionaries, agents, or what not.

The salient fact is that express commissions are inextricably interwoven with the wages which the Railway contracts to pay agents. It must, therefore, be held especially in view of the close property relationships between the railways and the Railway 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 agreements, insofar as express commissions are found to be an essential factor in determining the wages to be paid by the railway. In the judgment of the Referee, this ruling would be sound even though the railways and the Railway Express Agency, Inc., were not in these corporate relationships as closely interwoven as they are. With them so interwoven, such a realistic approach becomes inescapable."

In Award 548 this Division said:

"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.'"

And in the very recent award, 1321, speaking through Judge Rudolph, this Division said:

"The carrier contends first, that this board is without jurisdiction to consider this claim as a claim against the railway company, and asserts that, if a claim exists, that it is one against the Railway Express Agency. Carrier made this same contention in Docket Number TE-325, Award No. 392, and we quote at length from this board's response to that contention:

"The carrier's principal contention is that this Board is without jurisdiction to deal with the dispute here presented in the matter of express compensation, since the character of that compensation and all policies with respect thereto are fixed by agreements or understandings between the employees and the Railway Express Agency to which the carrier is not a party. Such contentions have frequently been urged upon this Board, and it appears to be its established view that these contentions are without merit. The disputes involving express compensation uniformly arise in connection with employees who are serving as joint railway-express agents. Primary employment is with the railroad, but under agreement between the railroad company and the express company, express service is also performed by these employees. Express compensation constitutes a part of the total compensation received by the employees, and this is true whether the express compensation takes the form of percentage commissions or of periodic payments for transfer or other service. Because of the intimate relationship existing between railroad compensation and express compensation, coupled with the fact that the extent and character of the express service to be performed is necessarily within the general control of the railroad, it has been repeatedly recognized that a sound and realistic adjustment of the relations between the three parties justifies procedure against the railroad company in connection with grievances against the express company. In the instant case not only are all of these grounds for assuming jurisdiction present, as well as the fact that the Southern Pacific Company is part owner of the Railway Express Agency, but in addition the Telegraphers' Agreement to which the carrier is a party expressly provides, in Rule 33 (c) that "telegraphers required to serve express or commercial telegraph companies will have the right to complain of unsatisfactory treatment at the hands of said companies and will receive due consideration from the railroad company." Under these circumstances there can be no doubt whatever that jurisdiction may properly be assumed by this Board. Compare Award No. 387, Docket TE-401, rendered by this Division February 24, 1937, and see Awards 181, 218 and 297 cited therein."

"This Board has held in a long line of awards that responsibility attaches to a railway company when the express payments received by joint railway-express agents in connection with the handling of express are arbitrarily reduced. Cf. Awards 297, 313, 315, 387, 392, 507, 522, 528, 537. * * *"

It is next contended by the Railroad Company that its liability is limited to the provisions of Rule 18:

"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."

We quote from the employees' supplemental submission:

"The Organization has never questioned the dissolving of joint railway-express agencies where the dissolution was necessitated by honorable conditions, and does not take that position now. In the numerous instances mentioned by the Carrier at page 19 of its Position where express commissions have been discontinued (dissolving of joint agencies) subsequent to the Memorandum of Conference of June 26, 1926, we wish to point out that there is vast difference between those instances and the instances here involved. In the numerous instances mentioned by the Carrier in which joint agencies were dissolved, no separate commission agency was established to perform the express agency service formerly performed by the joint agent; instead, the agencies were dissolved due solely to a discontinuance of passenger train service and the handling given over to truck service from an existing express agency located elsewhere, but within trucking distance. An exception to this might be mentioned such as at Whitesboro, a station in close proximity to the Utica (N. Y.) express agency where, in order to facilitate the handling of express shipments to and from Whitesboro, the handling was given over to trucks from the Utica office. In none of these instances did the Organization raise objections as the reason for the change was honorable and the Organization has no desire to defeat any worthy purpose in transportation service."

The record further shows that, as a result of this discussion of the question of express commissions, the following understanding was reached between the New York Central Railroad Co. and The Order of Railroad Telegraphers as set forth in Memorandum of Conference, June 26, 1926:

"It is understood that the American Railway Express Co., will not make any change in present basis of commission without first conferring with the representatives of the Railroad Company, and the latter will in turn confer with the representatives of the employees before any action is taken. * * *"

This claim is based upon the arbitrary manner in which this Railroad Company permitted the Railway Express Agency, Inc., to remove these agents from their respective express agency positions without just cause thereby arbitrarily reducing the average monthly compensation in the amount of the express commissions they would have earned had they not been thus removed. The record clearly shows that there was no reason or cause for removing these agents with the exception of the one at Brewster which shall be referred to later in this opinion; that they had satisfactorily performed their work; that the local merchants appointed to take their places received the same commission. The carrier does not concede that these agents were arbitrarily removed but it does not deny it. A fair reading of this record convinces us that they were arbitrarily removed. Under these circumstances we cannot see how Rule 18 would apply. Rule 18 was inserted for the purpose of reimbursing agents who were rightfully and honestly removed. No party to this contract could have had any thought in mind at the time that it was made that it would give the Railroad Company, through its agent, the Railway Express Agency, Inc., a right to remove arbitrarily these men and then only to reimburse them as provided under Rule 18. The loss these claimants suffered through the arbitrary action of the carrier was the commission they were deprived of on express shipments

during the time they were wrongfully deprived of this part of their jobs. The record shows that the change at Brewster was made at the solicitation of the agent. Therefore, he is not entitled to be reimbursed. The record also shows that the Railroad Company increased the compensation which some of these agents received during the period of time they were deprived of handling express shipments. What amount this is compared with the commission they would have received, the record does not show. The agents, other than the one at Brewster, are entitled to be reimbursed in the amount of the express commission less the amount their wages were increased by the Railroad Company during the period of time they were deprived of the right of handling the express.

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 action of the Railroad Company and its agent, the Railway Express Agency, Inc., in the instant case, constituted a violation of the Telegraphers' Agreement and the agents removed, with the exception of the one at Brewster, are entitled to be reimbursed in the amount of the express commission during the period they are deprived of doing this part of their work, less the amount their wages were increased.

AWARD

Claim sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of June, 1941.