Award No. 2131
Docket No. TE-2091

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Company, Pacific Lines, that the Carrier erred in reducing the rate of pay of the position of agent-telegrapher at Westley, November 1st, 1940, from .7625 per hour to .7125 per hour, that the hourly rate of .7625 be restored and that all telegraphers occupying the position of agent-telegrapher at Westley since November 1st, 1940, be compensated for any monetary loss sustained because of the arbitrary and unilateral reduction in the hourly rate of pay instituted by the Carrier.

EMPLOYES' STATEMENT OF FACTS: Effective November 1st, 1940, Railway Express Agency business was installed at Westley, Western Division, and coincident therewith the Carrier by unilateral action, reduced the hourly rate of pay for the position of Agent-telegrapher from .7625 to .7125.

POSITION OF EMPLOYES: There is an agreement in effect between the parties to this dispute and this agreement is on file with this Board.

EXHIBITS "A" to "K" are made a part of this dispute.

The Rule under which the Carrier arbitrarily reduced the rate of pay does not confer such an authority upon the Carrier.

The Committee submits that no disturbance of the hourly rate at Westley was justified by reason of the installation of the Railway Express Agency business at that point.

The Committee insists the intent of the Rule is to maintain a correct balance between all rates under such circumstances and the Committee will prove this was not done.

The rule in question is Rule 33 (a) now quoted.

"RULE 33

"Express and Telegraph Commissions

"(a) 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."

tioner contends and has contended that $.7625 is the proper rate and has been the proper rate since Westley was changed to an express agency, it has the additional burden of proof to affirmatively establish that similar positions existed at the time Westley was changed to an express agency and now exist, that pay a rate of $.7625 per hour. Unless the petitioner can establish the foregoing, and the carrier submits that it has not and cannot, the Board is without right to sustain the alleged claim in the instant case, for to do so would be tantamount to making an agreement for the carrier where no agreement exists. That the Board has the authority to construe and enforce agreement, but not to make them is a principle so well established that no citations in support of it are necessary, although numerous could be offered.

The record in the instant case will disclose that the petitioner's position has constantly been a negative one, namely, that the carrier was in error in establishing the rate of $.7125 per hour, and that the rate of $.7625 per hour was a proper rate subsequent to November 1, 1940. To support its position that the rate of $.7625 per hour should have been continued subsequent to November 1, 1940, it was incumbent upon the petitioner to affirmatively prove that "similar positions" paid the rate of $.7625 per hour. This the petitioner has never done or offered to do, for the reason that it could not offer or present such proof. Notwithstanding these facts the carrier, in good faith, as previously mentioned, offered to increase the said rate of $.7125 to $.7375 per hour but the petitioner merely assumed the arbitrary position that the rate of $.7625 could not be lowered. In other words, the petitioner has at all times refused to recognize the applicability of Rule 33 (a) and such being the case, the Board can only properly inform the petitioner that Rule 33 (a) was and is applicable and further inform the petitioner that not having proved or offered to prove that positions similar to the position of agent-telegrapher at Westley are paid at the rate of $.7625 per hour no valid basis exists for a claim that rate of $.7625 per hour should now be paid the position of agent-telegrapher at Westley, or should have been paid subsequent to November 1, 1940.

CONCLUSION

The carrier respectfully submits that it is incumbent upon the Board to dismiss the alleged claim in the instant case for want of jurisdiction; however, if the Board should assume jurisdiction then the carrier respectfully submits that the alleged claim being entirely without merit it should be denied.

OPINION OF BOARD: The question here is as to the right of the Carrier to reduce the pay of an agent at Westley, a small one-man station. On November 1, 1940, Westley was established as a joint railroad and express agency and the pay of the agent was reduced from $.7625 per hour to $.7125 per hour. The Carrier claims that its action was in accordance with the requirements of Rule 33 (a) which reads as follows:

> "(a) 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."

It appears from the record that the amount received by the agent in express commissions has been very small, in fact purely nominal, amounting in a six months' period from October 1941 to March 1942 to an average of slightly more than $2.00 per month. The reduction in pay is obviously substantial. The Carrier's position is that it was its duty in accordance with the rule to reduce the pay to conform to the rates paid in similar positions.

It gives statistics with reference to three other agencies which it claims are comparable. The figures relate only to the amount of railroad business at these agencies and do not include the amounts received by the agents as commissions. The Carrier's position may be summarized thus. Assume stations A and B are comparable as to amount of business handled. Express business is taken over by station A for which the agent in charge receives commissions and the Carrier in accordance with the rule decreases the rate of pay of the agent to compensate for the extra amount received in commissions. Then station B becomes an express station. The Carrier claims that the rate for station A fixes the rate for station B without any reference to the commissions which may be received by the agents in the two positions involved.

Carrier cites Award 908. This does not support its claim. This award concerned a position where commissions were discontinued and holds that the rate of pay to be fixed for the regular work should be based on the rate at comparable stations where no commissions were received by the agents. The claimant evidently contended that the Carrier had no right to reduce the total compensation which he had been receiving. This position was not supported by this Board. That was an entirely different question from the one now before us.

We feel that the error of the Carrier in the stand which it has taken on this claim arises because it has considered only the bare words of the rule without any reference to the intent and purpose of the parties in using them. Where actual violence is not done to the language of an agreement, it should be so construed as to carry out the intent of the parties. Above all else, if agreements are to be of any use, an interpretation should be avoided which is clearly contrary to what the parties contemplated. In commenting on a similar problem a jurist has called to mind the well known saying: "The letter killeth but the spirit giveth life." The purpose of the parties in framing this rule was obviously to stabilize within practical limits the amounts received by agents at one-man stations. If commissions of substantial amount are to be paid in addition to the salary, it becomes the duty of the Carrier to adjust the salary downward. The difficulty apparently arises over the phrase "conforming to rates paid for similar positions." It is apparent that this language has greater relevancy to the situation where commissions are done away with than to the case where they are added to regular pay. In the view which we take of the problem now before us it is not necessary to decide this particular point. Nor do we decide that the phrase, "conforming to rates paid for similar positions," means that the Carrier must do more than see to it that the regular pay is sufficient to maintain with commissions the regular rate paid to the occupant of the position prior to taking on the additional duties. All that this claimant asks is that the old rate which he received before the change should be reestablished with compensation for his monetary loss. We think he is entitled to this. The commissions which he has received seem to have been purely nominal. Though technically perhaps the Carrier can justify some modifications of the rate, we feel that before the provisions of this rule become operative there should be some substantial reason for invoking it.

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 of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier was not justified in reducing the rate of pay of the Claimant.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.