

Award No. 4232

Docket No. TE-4063

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Union Pacific Railroad Company, Eastern District:

(1) That the express commission rate of five percent (5%) on all carload express shipments is the established rate for all joint railway-express agents on the Nebraska Division, except at Lyman and Gering, Nebraska, and South Torrington, Wyoming, at which points no express commission is paid to the agents;

(2) That the joint railway-express agent at Alda, Nebraska, on the Nebraska Division, is entitled to the established express commission rate of five percent (5%) on all carload express shipments received at the Alda station for the Cornhusker Ordnance Plant at Coplant, Nebraska, which Coplant is within the switching and city limits of the Alda station; and

(3) That the joint railway-express agent at Alda, Nebraska, shall be paid for all carload express shipments received at this station January 22, 1945, through April 26, 1945.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date April 1, 1938, as to rates of pay and working conditions covering the entire Union Pacific Railroad Company was in effect between the parties to this dispute during the period involved. This agreement was revised as of November 1, 1947, without substantial changes and made to apply only to the Eastern District of the railroad which district includes the Nebraska Division, the Division here involved, and is the current agreement between the parties to this dispute.

The joint railway-express agency at Alda, Nebraska, on the Nebraska Division, was covered by the said agreement of April 1, 1938, during the existence of this dispute, and continues to be covered by the said revision of the agreement of November 1, 1947.

Five percent (5%) has been for many years the established express commission rate on all carload express shipments, either received or forwarded; at Alda and payable to the joint railway-express agent at Alda.

Commencing January 22, 1945, and continuing through April 26, 1945, the Railway Express Agency, Inc., with the unilateral consent and approval of

point in the Ordnance Plant where the express shipments were unloaded is approximately 4.1 miles from the Alda station and no part of the plant is within the city limits of Alda. (See Carrier's Exhibit A.)

This claim is not supported by the Agreement between the Organization and the Carrier and in previous discussions of this claim the Organization has cited no rule which supports their claim.

8. Previous Awards by this Division.

The situation presented in this dispute must be distinguished from those numerous awards made by this Division of the National Railroad Adjustment Board which ordered re-established commission rates where the Express Agency had arbitrarily reduced the rate of commission without negotiating such reduction under the terms of the Railway Labor Act. This is not the type of case. Express commission rates have not been reduced here—arbitrarily or otherwise. The fact is, as pointed out heretofore, Claimant is asserting claim to commissions to which he is in no way entitled.

The Board's particular attention is invited to Third Division Award 2522, Docket TE 2459, in which Bruce Blake was referee. In this case, the Southern Pacific agent at Tahoe, California, claimed that he should be paid express commission on a shipment which was originally destined to Tahoe and was diverted by the Railway Express Agency and delivered by it to the consignee at Truckee, California. The shipment involved was held at Truckee by the exclusive Railway Express Agency agent and delivery was made at Truckee. The carrier maintained that:

"The Claimant is only entitled to express commissions for express shipments that in fact originate or terminate at his agency and **which are handled by him.**" (Emphasis supplied.)

The Board denied the claim and sustained the Carrier's position.

In Third Division Award 2555, Docket TE 2578, in which Curtis G. Shaake was referee, the joint agent of the New York Central and the Railway Agency at Mentor, Ohio, claimed he was deprived of certain commissions upon which his compensation depended in part, when the Express Agency extended its pick-up service from its independent office at Painesville, Ohio, into the territory which was formerly served by the Mentor office. The parties agreed that after such pick-up service was established certain named shippers ceased to patronize the Mentor office, with consequent loss of commissions to the claimant agent. In denying this claim, this Board stated:

"On this state of the record we are unable to say that there has been any change in the 'basis of commission' applicable to the Mentor agency. The commission rates there, 5% on carload and 10% on less-than-carload shipments, remain exactly what they were before. **To hold that the agent is entitled to protection against practices and methods of operation that may result in a decline in the volume of business upon which his commissions are computed would lead to endless controversy and confusion.** Such a conclusion would involve the parties in a consideration of every conceivable circumstance that might be calculated to disturb the continuance of a steady flow of business at a given point." (Emphasis supplied.)

9. Conclusion.

In view of the foregoing, the Carrier asserts that it has established that the claim submitted herein is without basis or merit and respectfully submits that it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The situation herein presented was created by an unusual set of circumstances which brought into being this claim.

Alda, Nebraska, is a small town near Grand Island in the same state. Claimant is the agent-telegrapher at Alda. As a part of the war effort, in the late war, an ordnance plant was erected, the southern edge of which was approximately one mile north of the town of Alda. The plant known as "Cornhusker Ordnance Plant", and designated and popularly termed as "Coplant", covered an area of 20 square miles. On the main line of the Carrier, Omaha to Ogden, Grand Island is six miles east of Alda. By reason of greatly increased traffic, following the building of Coplant, it was necessary that new trackage be laid. These new tracks were built to enter Coplant at a point at the east part and near the east town limits of Alda, extending in a northerly direction and continuing a distance of between five and six miles, to a point where said tracks joined the main line of the Chicago, Burlington and Quincy Railroad. Thus, as was the practice in such matters, during the war period, the ordnance plant was served by two carriers.

Prior to the building of the ordnance plant, as stated, the claimant had received commissions on express shipments, in accordance with an agreed schedule of percentage rates. As the town of Alda is small, less than two hundred population, these commission payments for a period from 1941 to 1946, inclusive, averaged slightly less than \$40.00 per year, less than carload basis.

Claimant contends that he is entitled to express commissions on carload shipments passing through Alda station to Coplant, on the theory that the area covered by the plant is within the territory serviced by the Alda station on express and freight shipments; that the Agent was required to take the car numbers and initials on all carloads received in the normal operation of the station and in support of the claim the same are listed; that if Carrier can do this, all business could be diverted from the station and given to some other station along the line. Also, it is contended in support of the claim that a great mass of evidence has been presented by the Carrier which was accumulated after the completion of the handling of this case on the property and therefore should be disregarded in the consideration given by the Board to the claim. It is contended that this evidence largely has no direct bearing on the claim, as made, and that the sole question involved is the right of Claimant to such commissions on carload lots passing through Alda station, thereby ending the transit tour, it being delivered within the territory serviced by the station. Further, it is contended that the claim should be sustained because the station at Alda was the receiving point of the express shipments. In support of the claim is cited a situation which is claimed to be directly in point: that of the practice at Mead, Nebraska, which prevailed during the war period. Mead, a town of the size of Alda, is located on the Carrier's Omaha-Kansas City line and is located a like distance from another ordnance plant in operation during the period of time under consideration. There, the Mead station handled the express shipments under similar conditions and was paid the commissions as are here requested.

The Carrier as a defense to the claim contends, in the first instance, that it is not a proper party to the dispute; that the claim is based, not as against the Carrier for specific violation of rules of the Agreement between the parties, but is in fact against the Railway Express Company, not a party herein. Therefore, any claim on behalf of the Alda Agent for alleged handling of carload express shipments must be payable by the Railway Express Agency, Inc., which has not been made a party to this dispute. They contend that the only rule in the Agreement between Employees and Carrier dealing with express and commissions thereon is Rule 19 (a), and this rule by its terms is not here involved. Rule 19 (a) of the Agreement, effective April 1, 1938, provides:

"When commissions accruing to any position are materially reduced, or entirely removed, and it has been recognized that the commissions received operated to influence the rate downward, prompt adjustment in rate shall be made."

It is contended on behalf of the Carrier that the failure of Employees to make the Railway Express Agency, Inc. a party to any dispute of this nature defeats the claim.

On the factual premise presented, Carrier contends that there being no legal or contract obligation, it was proper for the Cornhusker Ordnance Company to designate and use the Railway Express Agency, Inc. office at Grand Island, Nebraska, as the official station for forwarding and receiving its express shipments, both L.C.L. and carload, as was the procedure and practice in this matter. Also, they contend that no legal or contractual obligation existed which prevented the Railway Express Agency, Inc. from accepting and releasing the express shipments received from and destined at its Grand Island office.

It is further contended that the Claimant, Carrier's agent-telegrapher at Alda station, also acted as the Railway Express Agency, Inc.'s agent at that station, and in so acting, he held no exclusive legal or contract right to receive and handle all express shipments originating or finally destined within the limits of Alda, freight switching limits or territory contiguous thereto. Any shipper or receiver of express had the elective right to designate, forward, and receive his express shipments through Grand Island instead of the Alda station office. The right to receive express shipment commissions was limited to such shipments forwarded from and being received at his station, over which he had the custody, did the collecting, made the charges and performed the necessary routine operations in connection therewith, reporting, accounting and handling. None of these duties being performed by Claimant herein, for the carload shipments involved, defeats any claim so made here.

Carrier contends that train transportation into and out of or through Alda, or the freight switching limits, did not give Claimant the right to automatically become the delivering agent for such shipments. The single act performed by the Alda agent as related in the record of evidence, i.e., his act of telephoning Coplant officials when trains were enroute to the fenced-in and guarded area of the plant, was performed as part of his duties as Carrier's agent-telegrapher in handling a train movement (relating to both freight and express), and not as an express agent in making delivery of an express shipment. On behalf of Carrier are cited Awards 2522 and 2555, and that, therefore, claim should be denied.

On behalf of the Organization are cited Awards 297, 313, 315, 387, 392, 507, 522, 528, 537, 866, 1466, 1702 and 2969.

The record as made has been reviewed to considerable extent by reason of the vast amount of evidence presented and the long arguments made by the parties in support of their respective positions.

As stated, the situation created by reason of the war effort is unusual in most of its aspects. It would seem that a matter of primary importance is the delivery point to which the express shipments in question were consigned, and from the record it is found that the consignee directed that these shipments be consigned "Coplant", Grand Island, Nebraska. Petitioner contends that this was arranged by the Carrier to defeat him in the payment of these commissions. However, there is no evidence of conclusive nature in the record that this was the true situation. Any consignee of express may designate where delivery is desired, and is not limited to the nearest agency. Therefore, the U. S. Army, Supervisor of Coplant, and the Quaker Oats Company, lessee of the plant, could designate Grand Island, Nebraska, and take delivery within the plant.

Has Petitioner, by reason of the arrangement previously existing and continuing to exist during the period in question covered by the claim, a priority to all commissions on express delivered in what he construes to be the Alda territory? The answer would seem to be in the negative. Petitioner contends that the Railway Express Company could establish an agency within the town limits of Alda and for adjacent territory which would deal exclusively in the express business, but that it cannot take part of this business away from him, i.e., take away part and leave part of this business under his jurisdiction. In other words, that as long as he is the agent for the express agency in Alda, and surrounding territory, he retains the right to act as sole agent of the Company within the area. This conclusion on the

part of Petitioner does not seem to be based on good logic. If Petitioner views the relationship as one which could be entirely taken away, such as by establishing an exclusive agency, by what logical basis can he complain of the situation here existing? It is not deemed that such a situation, as just outlined, really meets the problem here presented. The question here involved is the right of a consignee to designate where and how he will accept delivery. Can it be said that if a consignee directs that express shipments shall be consigned "Coplant", Grand Island, Nebraska, the fact that the same passed through the switching limits of another town, as here, Alda, and actual delivery made within Coplant, that the right to commissions have been earned by an agent at such place? Also, where the agent did not effect actual delivery and did not do those acts necessary to complete the entire transaction, such as accounting for same and kindred acts in relation thereto, is the right to commissions earned by an agent?

Coplant can be designated as having a legal being, in and of itself, during the war period. It cannot be said to be dependent on, or as an adjunct of Alda, Nebraska. It had a legal being for all purposes of its own and in no way could be said to be an adjunct, or a part of the town of Alda, Nebraska. As to its being in the natural territory of Alda in order that it be serviced by mail, express, freight and public utilities, the situation, if true, would border on the impossible. When this plant came into full operation, its population, its need for all public services far exceeded that of a small town like Alda. The territory covered by the plant was 20 square miles, and became a small city in itself. Suffice to say, the office at Alda created for the use of express patrons was entirely inadequate to meet the demands of the situation. On behalf of Petitioner is cited the situation at Mead, Nebraska, during the war period. However, the record shows that at Mead it was necessary to increase facilities, employ additional personnel and undoubtedly do several things to meet the increased patronage. Had the consignee in this case designated Alda as the terminal point of express shipments, like steps would have had to be taken to meet the situation. However, as stated, regardless of the method by which it was done, the consignee, did not designate Alda as the place at which delivery was to be made.

The record shows actually delivery was not made at Alda, Nebraska. Did the checking of cars (Carrier states that the agent was not required to check the cars and the meager record made by Petitioner served no useful purpose with relation to the delivery of the same) and the telephoning to an officer in charge within the plant of the arrival of certain cars on Alda switching limits constitute actual delivery? The answer is in the negative as certain essential acts were necessary, and were not done by, Petitioner, in completing delivery.

As to who are the proper parties to this dispute and the further fact of the jurisdiction of this Board to act in the matter, the following seems to be the situation: Under 19(a) of the contract between the parties (set out above), it is provided that "When commissions accruing to any position are materially reduced * * * prompt adjustment in rate shall be made". There is no showing here that average commissions accruing to the position have been materially reduced. From the record, apparently express commissions at Alda continued as previously. As shown, these average over a six-year period at approximately \$40.00 per year. The next provision in Rule 19 (a) provides: "* * * or entirely removed * * *". There is no showing made of sufficient nature that such source of revenue was entirely removed. Continuing under the rule: "* * * and it has been recognized that the commissions received operated to influence the rate downward, prompt adjustment in rate shall be made." On this last provision the rate previously paid undoubtedly remained at about the same level. However, by reason of the war effort, the erecting of Coplant, the vast volume of business created during such emergency, cannot be said to have operated to influence the rate downward. In fact, the situation created would be exactly the reverse. This claim is based on a request for additional commissions, not on the basis or theory that revenues from commissions have fallen off. And in this connection, it cannot be said that the situation here

created (building of the ordnance plant) was not one which could have reasonably been foreseen by the contracting parties to the Agreement under consideration and, therefore, it must be presumed that in adopting the provisions of the Agreement, of which Rule 19(a) is a part, the parties did not consider and had no intent, either express or implied, that it was intended to meet emergency situations such as were created during the life of the Agreement. At best it would have to be said that the average situation created by such an emergency as here would, of necessity, be the subject of further collective negotiations. Therefore, can the situation here presented be construed to be a violation of Rule 19(a)? We think not. Also, the provisions, for reasons above stated, cannot be said to have been violated.

Suffice to say, for the reasons above stated, Rule 19(a) has not been violated. On the fact situation presented, there is nothing to prevent a consignee from designating place of delivery and conditions governing the same. Petitioner here had no exclusive or priority rights to the commissions in question. He states that his duties were increased. This may well be so as there would be greatly increased movement of cars, both freight, express and otherwise, by reason of the war emergency. Such a situation existed throughout practically the entire transportation field during the war emergency.

The awards cited have been considered. Award 2555, with Referee Curtis G. Shake sitting with the Board seems to be nearer to the present situation than others cited in that it deals with a similar fact situation and involves an interpretation of a like rule in the Agreement considered. In part this award holds:

"* * * To hold that the agent is entitled to protection against practices and methods of operation that may result in a decline in the volume of business upon which his commissions are computed would lead to endless controversy and confusion. Such a conclusion would involve the parties in a consideration of every conceivable circumstance that might be calculated to disturb the continuance of a steady flow of business at a given point. We do not believe that this subject was within the contemplation of the parties to the above agreement when they provided that there should be no change in 'the basis of commission,' without negotiation."

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 claim should be denied.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of December, 1948.