

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie Railroad Company, that

(1) The hourly rate of pay of the agent-operator positions at Belleville, New Jersey, as well as Walnut Street and Franklin Avenue Stations, Nutley, New Jersey, shall be readjusted to conform to rates paid to similar positions in the same territory at Montclair and Arlington, New Jersey; and

(2) All employees working these three positions affected by this rate adjustment shall be paid in accordance with Paragraph 1, commencing November 1, 1948, the date the express commissions were abolished at these stations.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing the date of January 1, 1939, with subsequent amendments, is in effect between the parties, hereinafter referred to as the Telegraphers' Agreement; copies thereof are on file with the National Railroad Adjustment Board.

These three positions are listed on Page 14 of the agreement as follows:

| | |
|-----------------------|----------------------------------|
| Belleville | Agent-operator 66 cents per hour |
| Walnut Street | Agent-operator 65 cents per hour |
| Franklin Avenue | Agent-operator 65 cents per hour |

Various wage increases dated between January 1, 1939, and November 1, 1948, negotiated on a national basis, granted all employees on the Erie Railroad represented by The Order of Railroad Telegraphers an increase of 53 cents per hour. The following rates were in effect November 1, 1948, the date that the Carrier discontinued the express commissions at these stations. These rates do not include the increase provided for by the National Agreement of March 19, 1949, of 7 cents per hour retroactive from October 1, 1948:

| | |
|-----------------------|-----------------|
| Belleville | \$1.19 per hour |
| Walnut Street | 1.18 per hour |
| Franklin Avenue | 1.18 per hour |

On October 9, 1950, the Carrier received a copy of Mr. G. E. Leighty's letter to Mr. A. I. Tummon, Acting Secretary, Third Division, N.R.A.B. setting forth his intention to file an ex parte submission with your Board.

POSITION OF CARRIER: The Carrier does not require its agents to act as express agents. This is and always has been a matter arranged between the Railway Express Agency and the employee.

While Rule 28 has been shown between this Carrier and certain of its agents and agent-operators and provides for a rate adjustment when express commissions are discontinued or created, which means that the rate paid by the Carrier may be adequate or that such rate may be increased or decreased, all of which depends upon the facts and circumstances. It has never been the practice to reduce the Railroad wages of any agent by reason of increased earnings from express commissions. However, on several occasions when express commissions were discontinued the rate of the agent was determined under this Rule 28. The Carrier submits that in each case the rate was adjusted that such adjustment was accomplished by negotiation.

The Carrier has shown that in the instant case it did recognize Rule 28 and that it did negotiate the matter as contemplated by the rules. Further that full consideration was given to the work and duties of the agents involved and that such rates were adjusted in accordance therewith and in accord with the understanding reached in conference with the General Chairman on June 19, 1950. See Carrier's letter dated June 28, 1950, referred to above.

The Carrier submits that the matter of adjusting rates is one for negotiation between the parties herein involved therefore, if the Employees desire to further adjust the rates in question, such request is one for negotiation as contemplated by the rules and the Railway Labor Act.

In so far as the Carrier is able to anticipate the basis of this claim it is an attempt to secure, by means of an award from your Board, rates of pay not properly negotiated because rates of pay are a matter of negotiation between the parties involved and your Honorable Board should so hold.

The claim is without merit and should be denied in its entirety.

OPINION OF BOARD: This case involves the adjustment of rates arising from discontinuance of express service.

On November 1, 1948, the Railway Express Agency instituted a pick-up and delivery service to serve the towns of Belleville and Nutley, New Jersey, thereby discontinuing joint agency service at these stations. At the same time, the Railway Express Agency, Inc., entered into an arrangement with the agent at Franklin Avenue, Nutley, to pay \$50 for what the express agency termed "on hand arrangement." Later this arrangement was discontinued.

After the commission arrangements were discontinued, the rates of pay applicable to the agency affected became subject to Rule 28, which reads:

"When Express Commissions are discontinued or created at any station, prompt adjustment in the rates of pay of the employee affected will be made to conform to rates paid for similar positions at other points in same territory."

The organization claims loss of substantial commissions to the agents in question. It claims that over a period of 5 years the average express

commissions paid the agents in question for the period 5 years prior to November 1, 1948, were as follows:

| | |
|-----------------------|--------------------------|
| Belleville | \$150 to \$220 per month |
| Walnut Street | 175 to 200 per month |
| Franklin Avenue | 175 to 190 per month |

The Carrier does not challenge these estimates of loss except to say that it does not have access to the accounts of the Railway Express Agency, Inc.

The Carrier claims that the matter of adjustment of rates was still in the process of negotiation at the time that this case was submitted to this Board and that therefore this Board should not take jurisdiction. The record shows that commencing November 3, 1948, until June 19, 1950, there was an exchange of considerable correspondence and a number of conferences.

At a conference held on June 19, 1950, the Carrier proposed a 40 cent per hour increase to be divided between the three positions. It proposed an effective date of January 1, 1950, but did not state how the proposed division would be made between the three positions. On June 28, 1950, the Vice President of the Carrier wrote the General Chairman a letter advising him that the Carrier agreed to establish effective January 1, 1950, the following rates:

| | |
|-----------------------------------|-----------------|
| Belleville, N. J. | \$1.61 per hour |
| Walnut St., Nutley, N. J. | 1.68 per hour |
| Franklin Ave., Nutley, N. J. | 1.58 per hour |

A copy of this letter was sent to three representatives of the Carrier who were, according to the letter, to arrange for the necessary procedure to adjust the rates of pay and make the necessary retroactive adjustments due under the settlement.

On July 1, 1950, the General Chairman wrote a letter to the Vice President of the Carrier, the relevant portions of which read as follows:

"There seems to be a misunderstanding in connection with agreeing on suitable rates and also effective date. You will recall that you were to advise me as to your proposed division of 40c per hour increase to be applied to the three positions and I was to consider your proposal.

As to the effective date you will also recall that I referred you to my letter addressed to Mr. Randall of May 25, 1949, and saying that I did not feel we were responsible for the delay.

I will contact Mr. Thompson as to his understanding of our conference and also Mr. Devito in connection with his letter to Mr. McGranahan of February 11, 1949, and I will advise you if your proposed settlement is acceptable."

Without replying to this letter as of July 10, 1950, the district accountant advised the General Chairman that retroactive pay adjustments for the period, January 1 to June 1, 1950, were made on the June last half pay rolls, indicating the amounts, and that the rates referred to in the letter of the Carrier dated June 28, 1950, had been put into effect.

On September 25, 1950, the General Chairman wrote to the Assistant Vice President of the Carrier, advising him that proffered settlement which the Carrier had put into effect commencing January 1, 1950, was not

acceptable, referring to situations which the Organization regarded as being comparable. Thereafter the General Chairman was invited to a conference, but apparently nothing came of this conference.

We are of the opinion that the contention of the Carrier that the matter before us was still in negotiation at the time of the submission to this Board is without merit. The letter of the Carrier dated June 28, 1950, was written by the Carrier without any communication received from the Organization following the conference held on June 19, 1950. After receiving the letter on June 28, 1950, in which the Carrier set forth its proposed settlement, the Organization promptly thereafter, on July 1, 1950, wrote to the Carrier advising the Carrier that the proposed settlement was not satisfactory. Notwithstanding this written communication, the Carrier then proceeded unilaterally to institute the rates of pay which it set forth in the letter of June 28, and made retroactive payments to January 1, 1950. This action by the Carrier certainly is not consistent with that of a party still in the process of negotiating a settlement. It gave the Organization every right to believe that it was not possible to achieve anything by further discussions of the issue. Accordingly, it is our opinion that this matter is properly before this Board and that it is incumbent upon us to resolve the basic issue of the application of Rule 28.

This brings us to the contention of the parties with reference to the merits of the case. The Organization contends that in the application of Rule 28, the positions in the stations which are most closely comparable to the ones in question are those located at Montclair and Arlington, New Jersey. The Carrier, on the other hand, contends that the stations which should be used for the purposes of adjustment are those of Carlstadt and Orangeburg, New Jersey.

The Carrier first contended that the stations which should be used for purposes of comparison were Fairlawn and Hawthorne. The basis for their contention was that in the 1939 Agreement the rates fixed for the agents in these stations were almost the same as those for the stations in question. However, the Carrier offered no data with reference to the workload of the stations in question, nor was there any effort to develop for the record what had occurred in relation to these stations since the Agreement was made in 1939. As a matter of fact, the Carrier seems to have abandoned the use of these stations as a standard for comparison and instead now relies upon Carlstadt and Orangeburg, New Jersey.

It appears that the stations in question and the stations at Arlington and Montclair handle passenger business as well as freight business, whereas Carlstadt and Orangeburg handle no passenger traffic and no tickets are sold. It does appear from the record that in terms of items handled, LCL Tonnage, car loads and total revenues, the three stations in question present a workload which is as great, if not greater, than those of Montclair and Arlington. It is also true that a similar result is achieved by comparing the workload of the three stations in question with Orangeburg and Carlstadt. We think, however, that the absence of passenger business at Carlstadt and Orangeburg is an important consideration. The agents in the stations in question are required in order to sell tickets, to have a knowledge of passenger tariffs and the ability and experience to handle the routing of passengers, and must assume the responsibility in connection with this activity.

The Carrier contends that the Arlington and Montclair rates are in excess of what they should be and therefore they should not be used as a basis for comparison. The Organization, on the other hand, contends that the rates for the agents at Carlstadt and Orangeburg are sub-standard. They point to the fact that Carlstadt is a station on a different railroad, although a part of the Erie System, and that subsequent to establishing a rate for Orangeburg a military camp was established during World War II which added considerably to its traffic. The Organization has attempted to obtain increases for these two agents without success.

The Board cannot inquire into the issue whether the rates being paid the agents at the several stations used for purposes of comparison are either sub-standard or excessive. The application of Rule 28 does not require a revaluation of the rates of all agents' positions of the Carrier in the territory in question. It is questionable whether the Board has authority to make such an inquiry. In any event, the record before us is devoid of the requisite detail necessary to make such an evaluation and the best the Board could do would be to indulge in conjecture. This we cannot do. We must accept the rates as we find them.

Rule 28 is bottomed upon many awards of this Board, which have held that express commissions are a part of the basic compensation of the employes, and their elimination requires adjustment of the compensation of the employes in accordance with the Agreement. (See Awards 181, 392, 866, 1321, 1702, 3408, 3937, Interpretation No. 1, Serial No. 77.)

Rule 28 fixes as a standard the rates paid for similar positions in other points in the same territory. This Board cannot apply this standard with absolute precision. No two positions are exactly alike. There are differences in workload as between the three stations for which the claim was made. There are also differences between the stations used as a standard for comparison. Our examination is primarily concerned with the responsibilities and duties of the positions and in forming our judgment we can only approximate positions of similar importance. This we have endeavored to do on the basis of the record. Thus, using the criteria which have been jointly advanced by the parties, the nature, character and extent of the workload and responsibilities, we believe that the positions which are most similar to the stations in question are those of Montclair and Arlington, New Jersey. (See Awards 866, 3485, 1702 and 5056.)

The only remaining question relates to the effective date of the adjustment of rates. The record shows that two days after the express commissions were discontinued, the Organization applied for an adjustment of the rates, and it continued to exert effort to bring about adjustment thereafter until the unilateral action of the Carrier on July 10, 1950. No sound reason has been advanced to this Board why the adjustment should be made effective at any date other than the date when the express commissions were discontinued. In the case of the Agent at Franklin Avenue, Nutley, the Award will be effective as of the date the special arrangement with the Express Company was discontinued.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

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 Carrier violated the Agreement.

AWARD

Claims 1 and 2 sustained in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of November, 1951.