Award No. 5643
Docket No. TE-5641

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert Wyckoff, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES IN TEXAS AND LOUISIANA

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana:

(a) That the Carrier violates the terms of the agreement between the parties when it declines payment to agents covered by the agreement for service covering the handling of milk and cream shipments, received and forwarded by baggage;

(b) G. W. Russell, Agent, Edinburg, Texas, and L. F. Moore, Agent, Opelousas, Louisiana, be paid on a commission basis for handling shipments of milk and cream; such basis to be at the same rate formerly paid agents by the Express Company when the business was handled by express instead of baggage.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date of October 15, 1940, as to rates of pay and rules and working conditions, and a letter of understanding dated July 12, 1932, signed by Asst. General Manager, L. A. David, are in effect between the parties to this dispute.

Prior to November 22, 1926 all shipments of milk and cream were handled by express. On this date, the Carrier commenced handling such shipments by baggage and issued notice to all station agents that commissions for handling such business would be paid by the Carrier on the same basis as was formerly paid by the Express Company.

In conference July 1, 1932 with General Chairman, T. C. Berry of The Order of Railroad Telegraphers, Mr. L. A. David, Asst. General Manager, further agreed that commissions would be paid to agents handling milk and cream.

During the month of January, 1948, there were fifteen cars of milk shipped from Zambrota, Minnesota, to Edinburg, Texas by baggage. The agent at Edinburg, Mr. G. W. Russell, claimed credit on his report to the Auditor for commission at the rate of $10 per car. The Carrier refused to pay the commission on the shipments handled during January and continues to deny payment for the handling of such business.

During the month of January, 1948, there were four cars of milk and cream shipped from Minneapolis, Minnesota to Opelousas, Louisiana, by baggage. The agent at Opelousas claimed commission of $93.78 which

ments began to originate at such stations for movement in baggage service, the railroad agent would be entitled to commission on the theory that at the commencement of this service it would have been handled by him as express matter had the Carrier not adopted the arrangement of handling it in baggage service.

Since at both Edinburg and Opelousas the Railway Express Agency maintains a separate and independent office, and the agents at those stations did not handle express business for the Agency and consequently received no commissions from the Express Agency, they are not, under the provisions of Circular 45 (the Circular under which these claims are based) and the Carrier's intended application of the circular as explained above, entitled to commissions on milk and cream shipments handled at their stations. It is on this basis that the Carrier has denied their claims.

In the light of the foregoing record, it is the position of the Carrier that the claim here presented is without basis and should accordingly be denied.

The substance of all matters contained herein has been the subject of conference and/or correspondence between the parties.

OPINION OF BOARD: Prior to 1932 milk and cream shipments on this property moved via Railway Express. At points where Railway Express did not maintain its own agency, Agents of the Carrier also served as Agents of Railway Express and received from that Agency commissions on shipments including milk and cream handled at their stations. At stations where the Railway Express maintained its own agency, the Carrier's Agents did not handle express shipments and hence received no commissions on express shipments handled at such stations.

In 1926 the Carrier decided to handle this milk and cream business in baggage cars in competition with the Railway Express; and upon complaint by the Telegraphers that this step would take commissions away from them and in order to induce solicitation of this business by telegraphers, various circulars were issued from time to time and a letter passed to the General Chairman. They are set forth above in the Submissions.

The issue is whether, at stations where the Railway Express did maintain its own separate agency, the Carrier's Agents are entitled to commissions on milk and cream shipments. The precise issue is not whether the Claimants are entitled to the commissions as a matter of equity or what our notions of fairness might be, but whether the claims are valid upon the basis of the letter of July 12, 1932, in the light of the various circulars issued pursuant to it and what happened thereafter as shown by the record.

FIRST. Both the letter to the General Chairman and the various circulars issued pursuant to it are ambiguous. They do not expressly exclude agents at stations where the Railway Express maintained its own separate agency, but on the contrary are addressed to all agents of the Carrier without exception. The letter does say that agents will receive "the same commission they now receive from the Express Company on all milk and cream traffic". But it can be argued with equal reason that this was either a means of describing the amount of compensation by way of commissions for all agents of the Carrier or a means of describing the particular agents of the Carrier, to the exclusion of others, who would receive the commissions.

Ambiguities are generally resolved against the party who drafted them, and the Carrier drafted both the letter and the circulars.

SECOND. Assuming however that an ambiguity exists, evidence of practice may resolve it. The employes show specific payments of commissions to agents at stations where Railway Express did not maintain its own

agency including action by two Superintendents which was inconsistent with the position now taken here by the Carrier.

The Carrier meets this evidence of practice with the assertion that "they are isolated cases where payments were made contrary to the established and well-known policy of the Carrier". The Carrier is in a better position than the Claimants to come forward with proof of what the practice has been. As between admitted specific instances of practice and general assertions to the contrary, we take the former and find the practice to be established by the record as contended for by the Claimants.

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 letter Agreement was violated as above found.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of February, 1952.