

**Award No. 10436**

**Docket No. CLX-9115**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Martin I. Rose, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,  
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**RAILWAY EXPRESS AGENCY, INC.**

**STATEMENT OF CLAIM:** Claim of the District Committee of the Brotherhood that

(a) The agreement governing hours of service and working conditions between Railway Express Agency, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1949, was violated at the Worland, Wyoming, Agency, October 1, 1954 when Carrier instead of bringing all work involving the handling of express traffic, which properly belongs under the scope and operation of the agreement, assigned it to an individual holding no seniority rights under the agreement;

(b) The work shall now be brought under the scope and operation of the agreement and the position of Agent be properly rated, bulletined and assigned in accordance with agreement provisions; and

(c) All employees adversely affected as a result of Carrier permitting an individual holding no rights under the agreement, to perform the work in question shall be compensated for all salary loss sustained, retroactive to and including January 1, 1955.

**EMPLOYEES' STATEMENT OF FACTS:** Prior to October 1, 1954, all Railway Express Agency services at Worland, Wyoming were performed by C. A. Baston, an employe and Agent of the Chicago, Burlington and Quincy Railroad, on a commission basis. Effective October 1, 1954, the joint agency arrangement was discontinued and Carrier instead of bringing work involving the handling of express traffic under the Agreement established a so-called commission agency and entered into an agreement with Carroll Daugherty, an individual who held no seniority rights under the Agreement, whereby the latter agreed to perform all duties incident to the handling of Express traffic at Worland, Wyoming, on a commission basis. The duties required of Daugherty are the same as those normally and usually performed by occupants of positions titled Agent at one-man agencies, which comes under the scope and operation of the Agreement between the parties hereto.

"I think Referee G. Stanleigh Arnold in Decision E-1075 laid down the proper principles to follow. On the statement of facts

developed in this case, petition is denied."

Copy of Decision E-1433 is attached marked Carrier's Exhibit No. 3.

The evidence of record proves that:

1. The express work at Worland, Wyoming, has never been within the scope and operation of the Agreement between the parties.

2. It is not now within the scope and operation of the Agreement, but is being performed by an independent contractor who is not an employee within the definition of that term as set forth in Section 1 Fifth of the Railway Labor Act.

3. The express work now being performed by the merchant agent at Worland, Wyoming, is not defined as work of an employee of the Carrier under the orders of the Interstate Commerce Commission, and the Carrier does not report such individuals in its monthly and annual reports rendered to the Commission covering employees, service, and compensation.

4. The practice in the industry, antedating the development of the Scope Rule, beginning with Supplement No. 19 to General Order No. 27 and the many decisions cited by Carrier covering attempts to bring all express work under the scope and operation of the Agreement, require a denial of the instant claim.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This claim arose as a result of the Agency's change in the handling of express business at Worland, Wyoming. Prior to October 1, 1954, the express business at this location was handled by a railroad employee and Agent under a joint railroad-express agency arrangement. Effective October 1, 1954, the joint arrangement was discontinued and the Agency contracted with a local merchant, the proprietor of Gene Wimer's Glass Shop, to handle the express business under a merchant agent arrangement whereby the merchant agent conducted the business on a commission basis and assumed all items of expense in connection with such business. Effective March 1, 1957, the proprietor of the Ray Ramsey Furniture Company, succeeded Wimer as such merchant agent.

Petitioner contends that upon discontinuance of the joint railroad arrangement for the handling of the express business, the work came within the scope of the agreement by reason of Rule 1(b) of the applicable agreement because the commission paid the commission agent exceeded \$125.00 per month and that the failure of the Agency to establish a properly rated, bulletined and assigned position violated the agreement rules.

The Agency maintains that the work at Worland has never been under the agreement, that merchant agent arrangements are as old as the express business, that merchant agents are independent contractors not covered by the agreement, and that the merchant agent handles the express business only part-time, devoting the remainder of his time to his other business.

Rule 1 of the agreement reads, in part, as follows:

"Employees Affected—Rule 1. These rules shall govern the hours of service and working conditions of all employees in service of the Railway Express Agency in the United States subject to the exceptions noted below:

"Exceptions

"These rules shall not apply to— . . .

"(b) Individuals performing a particular service requiring only a part of their time from other occupations or business. Individuals whose services are necessary to care for emergency conditions which are beyond the control of the Agency and which cannot be handled by regular or unassigned employees. Railroad employees paid on a commission basis and other commission agents receiving a net monthly income of \$125. or less. Net income to be arrived at by deducting from gross commission such items as rent, telephone, light and vehicle expense, as well as amounts paid to others employed by them. Where net commission so arrived at is disputed, status will be determined by joint survey between the Management and the General Chairman . . ."

Petitioner relies on the phrase in Rule 1(b) which excepts from the agreement "commission agents receiving a net monthly income of \$125.00 or less." Petitioner interprets the term "commission agents" as applicable to the merchants who handled the express business. Petitioner argues that since their commissions or net monthly income from the business, concededly, exceeded \$125.00, the work they performed came under the agreement and could not be contracted out to them as outside contractors.

In accordance with well settled principles of contract construction, Rule 1(b) must be considered in its entirety, and its terms construed consistently. The exception covering "commission agents receiving a net monthly income of \$125.00 or less", relied on by the Petitioner, must be construed consistently with the exception for "Individuals performing a particular service requiring only a part of their time from other occupation or business" which is established by the first sentence of Rule 1(b) without limitation as to net monthly income or commission received for such service. If the exception for "commission agents receiving a net monthly income of \$125.00 or less" is applied to the unqualified exception for individuals performing service only part-time with their other business, the latter exception becomes meaningless. As a result, the part-time exception must be regarded as separate from the commission agents exception, and the fact that the net monthly income stipulated in the commission agents exception was exceeded does not preclude the applicability of the part-time exception.

The record establishes factually that the individuals who performed the disputed work did so on a basis requiring only a part of their time from their other business within the meaning of the exception from the agreement established by the first sentence of Rule 1(b). Express Board of Adjustment No. 1 Decisions E-1432, E-1439 and E-1405, cited by Petitioner, are not apposite here. Decisions E-1432 and E-1439 concerned exclusive commission agents and Decision E-1405 does not refer to the part-time exception.

**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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March, 1962.