Award No. 10620
Docket No. TE-9036

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Rock Island & Pacific Railroad that:

1. The Carrier violates the provisions of the agreement prevailing between the parties hereto when, having abolished express commissions at Jones Mills and Butterfield, Arkansas, on or about September 30, 1951, it fails and refuses to adjust rates of pay of the Agent-Telegrapher positions at these locations, and

2. Carrier shall now be required to adjust the rates of pay of said positions in accordance with applicable rules of The Telegraphers' Agreement.

EMPLOYE'S STATEMENT OF FACTS: There is in evidence between the parties hereto an agreement, bearing an effective date of August 1, 1947 as to rules and working conditions, and of September 1, 1947 as to rates of pay, all applicable provisions of which, as amended, are hereby invoked. Such rules or provisions which apply in this dispute will be quoted as Employes' Statement of Position is developed.

Jones Mills and Butterfield, Arkansas, are located on what is known as Carrier's Hot Springs Branch, (Little Rock to Hot Springs), time card Sub-Division No. 51a. Prior to September 30, 1951, Carrier operated passenger trains daily over this branch line, once in each direction, train No. 151 running from Little Rock to Hot Springs, train No. 152 from Hot Springs to Little Rock. Under its contract with the Railway Express Agency, Carrier handled express shipments on these passenger trains, and at Jones Mills and Butterfield allowed the respective agents ten per cent commission on all express business handled at those stations. On or about September 30, 1951, Carrier abandoned its passenger train and express service on this branch line, and concurrently therewith express commissions at these two points were abolished. Claim was filed by the petitioning Organization, for adjustments in rates of pay of the two agents, since their "average monthly compensation" had been reduced as comprehended in the governing rule. Carrier declined, necessitating this appeal to your Board. By mutual agreement between Carrier and Organization, the 9-month time limit for submitting this dispute to your tribunal was to run from November 9, 1955.

between Butterfield and other stations by making a plea for the substantial rate increase which the Carrier has declined to consider. The situation at Butterfield does not justify an increase. We have two large industries located four miles north of Butterfield on a spur. The Magnet Cove Mine loads mud in small hopper cars to their mill at Malvern where it is processed for use by oil well drillers and the finished product is billed out by Malvern. This mud moves into Malvern on a flat rate per car and all of the cars are billed on one bill from the mine to Malvern. National Lead Company load their product in box cars and is moved invariably to Alexandria and connections. There is also a quarry at Butterfield owned by us, operated by Paul Coogan. This is a small operation at the present time as we purchase none of this material for our own use. While earnings are relatively high at Butterfield, they are not indicative of work attached to position. Furthermore, your Board said in Award 6785 there are other factors to consider besides earnings:

> "To set rates solely upon the basis of gross revenue ignores many obvious qualifying factors, hence comparison by the Organization on such basis with the single station at Higginsville is unconvincing."

With successive pay increases, the Jones Mills and Butterfield rates would be comparable today had not the organization insisted in 1942 on a rate increase of 15¢ per hour for Jones Mills—based on work attached thereto—work which did not exist at Butterfield. In 1942 the Organization argued that 91¢ at Jones Mills and 76¢ at Butterfield represented a fair relationship between the two positions. Now they seek to deny that relationship is realistic and in effect seek to restablish the argued relationship on a higher level of payment. This, under the ruse that the cessation of passenger service and abolishment of express commissions threw the rates for Butterfield and Jones Mills up for renegotiation.

Rule 10 does not so provide. It provides for comparable stations. If none is found to exist, as here, a fair value on express commissions should be set. The increases which the organization have sought have been totally unrealistic. Carrier's Exhibit "C", showing express commissions earned by the Jones Mills Agent prior their termination in 1951, likewise show no great amount earned by the agent from this source. As in the case at Butterfield, it is doubtful if even a cent per hour increase could be justified on the basis of loss of personal income by the agent.

It is hereby affirmed that all of the foregoing is, in substance, known to the Employes' representatives.

(Exhibits not reproduced).

OPINION OF BOARD: Jones Mills and Butterfield, Arkansas, are located on what is known as Carrier's Hot Springs Branch, (Little Rock to Hot Springs), time card Sub-Division No. 51-a. Prior to September 30, 1951, Carrier operated passenger trains daily over this branch line, once in each direction, train No. 151 running from Little Rock to Hot Springs; train No. 152 from Hot Springs to Little Rock. Under a contract with Railway Express Agency Carrier handled express shipments on these passenger trains, and at Jones Mills and Butterfield allowed the respective agents ten per cent commission on all express business handled at those stations. On or about September 30, 1951, Carrier abandoned its passenger train and express service on this branch line and concurrently express commissions at these two points were abolished.

Rule 10(b) is involved here and it reads as follows:

"(b) When the express business or the commercial telegraph business is taken away or created, or when the commercial telegraph commissions are discontinued on any position, thereby reducing or increasing the average monthly compensation, the General Chairman will be notified and a prompt adjustment of salaries affected will be made, conforming to the rates paid for similar positions."

The General Chairman was never notified, as provided in said Rule. It is the claim of the Organization that General Chairman did not receive information as to the abolishment of express business and commissions until shortly prior to August 11, 1954 at which time he wrote Mr. G. E. Mallery, Manager of Personnel, of Carrier the following letter:

"Kansas City, Mo., August 11, 1954

Files: 105-129
105-123

Mr. G. E. Mallery,
Manager of Personnel, CRI&P RR.,
932 LaSalle St. Station,
Chicago 5, Ill.

Dear Sir:

I have just been recently informed that express business and commissions were abolished at Butterfield and Jones Mills, Arkansas, on or about September 30, 1951. No notification was given to the undersigned as required by Rule 10(b) of the existing agreement, hence the time limitation in Rule 30 of that agreement does not apply.

I request conference with you in order to determine justifiable adjustments in the rates of pay at these two stations.

Kindly advise time and date you will confer with me on this proposal.

Yours truly,

Geo. W. Christian
General Chairman"

cc—Mr. A. H. Aydelott, L.C.

The time limitation referred to is Rule 30 of the Agreement which reads as follows:

"**RULE 30. MONEY CLAIMS.** Any money claimed under the rules of this agreement shall not be paid retroactively in excess of thirty (30) days prior to the date of the first presentation of said claim to the carrier.

Revised by Article 5 of the August 21, 1954 Agreement, see below."

This rule was revised by Article V, Section 3 of the August 21, 1954 Agreement, effective January 1, 1955 which reads in part:

"3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants

involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient."

It is the claim of the Organization that since the Carrier had not notified the General Chairman as to the discontinuance of express commissions as provided in the rule, the time limit governing retroactively (Rule 30) should not apply. Organization further contends that in his first letter, making the claim, the General Chairman stated that by reason of the failure of Carrier to give him notice as required by Rule 10(b) "the time limitation in Rule 30 of that Agreement does not apply." The Organization further claims, and this claim is supported in the Record, that Carrier did not at any time during the handling on the property, take exception to the General Chairman's statement that Rule 30 did not apply and denied the claim on its merits. In its ex parte submission to the Board, the Carrier made no mention of Rule 30, nor contended that the effective date as set forth in the claim was in any way improper—by reason of the time rule or otherwise. For the first time, in its second submission to the Board, the Carrier contended that retroactivity of any required adjustment was limited by Rule 30.

In view of the failure of Carrier to give the required notice under Rule 10(b) of the Agreement and the further fact that Carrier did not raise the question of Rule 30, of the Agreement, on the property, we hold that any adjustment of the rates of pay of the positions involved in this claim be retroactive to September 30, 1951.

Carrier contends that the claim is totally lacking in merit for two other reasons, as follows:

"(1) The filing of this claim in its present form constitutes the splitting of a cause of action.

(2) There is inadequate data presented to support the claim."

With reference to the claim of Carrier that the filing of this claim constitutes the splitting of a cause of action we cannot agree. Many statements are contained in the Docket relative to actions of the Carrier arising long subsequent to the termination of express business at the stations involved and it is our opinion that such actions, if true, might subject the Carrier to further claims. The present claim was instituted by a letter dated August 11, 1954 and the various incidents which might involve a claim or claims did not occur until sometime later.

Carrier's next contention is that there is inadequate data to support the claim.

In connection with that claim it is true that the parties in the handling of the matter on the property did discuss the matter of proper wage increases and it might be said that they agreed upon certain rates but this agreement on the part of Carrier was conditioned upon certain things to which the Organization would not agree. Obviously Carrier's offer was one of compromise, and it is fundamental that a rejected offer of compromise is, after its rejection, no longer binding on the party who makes it: and, in law, evidence of such offer is not permitted to be introduced.

In their handling of this claim on the property, Organization in its proof as to salaries to make them "conforming to the rates paid for similar positions," submitted a claim for a raise in pay for claimant at Jones Mills based upon rate of pay of similar employe at Stuttgart, which Organization claimed was a similar position and a claim for claimant at Butterfield for the rate of pay then paid at Jones Mills. Carrier claimed that rate for Searcy was the more applicable rate.

If we could eliminate the foregoing from the offer of compromise, which we cannot, we still would not have sufficient information upon which we could base a rate which would be fair to the parties. To set rates solely upon the basis of gross revenue ignores many obvious qualifying factors, hence, comparison by either party on such basis and the very slight, other evidence in the record is unconvincing.

If the parties are unable to resolve their differences, this Board will undertake such responsibility, provided full, complete and detailed comparative information is furnished.

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 there is inadequate data presented by the parties to enable Board action. That the parties should negotiate further, consistent with the suggestions contained in the Opinion.

AWARD

That the Claim is remanded for further negotiations.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May, 1962.

DISSENT TO AWARD NUMBER 10620, DOCKET NUMBER TE-9036

This award is erroneous in failing to apply the retroactive provision of Rule 30 to any adjustment of rates.

The majority found two grounds for this holding: (1) "failure of Carrier to give the required notice under Rule 10(b) of the Agreement," and (2) "that Carrier did not raise the question of Rule 30, of the Agreement, on the property, * * * ."

As to the first, there is no basis whatever for holding that a violation of Rule 10(b) has the effect of completely nullifying the express language of

Rule 30. By doing so here the majority has written Rule 30 out of the contract and refused to give force and effect to the clearly expressed intent of the parties.

Furthermore, Rule 10(b) contains no penalty. Rule 30 expressly applies to "any money claimed under the rules of this agreement," and limits retroactive recovery to 30 days. Accordingly, if any penalty is to be applied, it should be Rule 30, the one negotiated by the parties, and not something without Agreement support.

In applying the penalty provision of Article V, Section 3 of the August 21, 1954 Agreement which the Board finds as the successor to Rule 30, **Second Division Award 3065** states:

> "That does not specify any particular kind of allowance, so it appears to apply to allowances by failure to notify of disallowance within 60 days and constitutes a restriction upon the retroactivity of monetary claims regardless of how allowed."

In effect, the majority has held that the penalty for a violation of Rule 10(b) is the loss by Carrier of its right to an application of Rule 30. Therein lies the basic error.

Likewise, the second reason assigned lacks merit. The majority found that Carrier never raised the question of Rule 30 on the property. Obviously this was not necessary since the Organization raised it in the letter quoted in the award, and Carrier's denial of the claim constituted its failure to agree with the interpretation outlined. In any event, awards have consistently held that the provisions of the contract are always before the Board. Representative of much authority is **First Division Award 15851:**

> " * * * No rule of this schedule need be specifically pled at any specific time to be applicable. All of the schedule rules are before this Board at all times and may be given such consideration and weight as is deemed proper."

/s/ T. F. Strunck

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan