Award No. 14373
Docket No. TE-14249

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific (Pacific Lines), that:

1. Carrier violated the terms of an agreement between the parties hereto when it failed and refused to properly compensate D. L. Rogers, Joint Railway-Express Agent, Inyokern, California, an amount equal to what he would have earned had he not been taken away from his regularly assigned duties to attend and serve as witness for the Carrier in a court action brought at Ogden, Utah, March 3 through 11, 1961.

2. Carrier shall, because of the violation set out in paragraph one hereof, compensate D. L. Rogers, in addition to what he has been paid, $69.03 express commission earned by the Relief Agent who filled his position at Inyokern during his absence, which he would have earned had such interruption not taken place.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties hereto effective December 1, 1944 (reprinted March 1, 1951, including revisions) and as otherwise amended. Copies of said Agreements, under law, are assumed to be on file with your Board and are, by this reference, made a part hereof.

D. L. Rogers, hereinafter referred to as Claimant, was, on the dates involved in this claim, the regularly assigned occupant of a Joint Railway-Express Agent — Telegrapher's position at Inyokern, California. Claimant is an employe of Southern Pacific, hereinafter referred to as Carrier. He is not an employe of the Express Company, but he performs service for the latter on a commission basis. These commissions are by express terms of the Agreement (see Rule 33 of the Agreement), a part of the Claimant's compensation for his service to the railroad, and the amount of his wages from the railroad are determined by taking into account the amount of commissions. This is evidenced by the fact that:

the provisions of this section, in addition to compensation for service performed.

Section (c). Extra employes and regular employes on vacation, leave of absence, or days off shall be allowed eight (8) hours' pay at the rate of the position last previously worked for each day used under this rule.

Section (d). Employes shall be reimbursed for any necessary actual expenses while away from the place of employment under the provisions of this rule. Any fee or mileage accruing shall be assigned to the Carrier."

and other compensation provided in that rule. Such practice of paying only wages at the agreed-upon rate of pay lost by the employe due to having been absent from his position under Rule 34(a) has been of long standing on this property without protest provided for in Rule 33(c), since the first telegrapher agreement was signed September 1, 1899, or for more than 63 years.

Claim arose when in his letter dated March 25, 1961 (Carrier's Exhibit A) Petitioner's District Chairman appealed the claim in behalf of the Claimant to Carrier's Division Superintendent for loss of express commissions in amount of $69.03 paid to employe performing relief upon the Claimant's positions of Agent-Telegrapher at Inyokern during the latter's absence from said position on dates in dispute.

By letter dated March 29, 1961 (Carrier's Exhibit B), Carrier's Division Superintendent denied the District Chairman's claim.

By letter dated April 13, 1961 (Carrier's Exhibit C), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel and the latter denied the claim in his letter dated November 23, 1962 (Carrier's Exhibit D), stating that no provision of the current agreement required that Claimant be paid express commissions earned by another employe and that Rule 34 was fully satisfied when Claimant was paid amount of his earnings for time involved and at the agreed-upon rate of pay prescribed by the current agreement, and that such payment conformed to long-standing practice on this property in similar circumstances under the current agreement and prior agreements for more than 63 years.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was the regularly assigned agent-telegrapher at Inyokern, California under the employ of Carrier. In addition to his regular duties for which he was paid an hourly rate ($2.55), he also performed service for the Railway Express Company on a commission basis. It was stipulated that the rate of wages paid by Carrier was adjusted pursuant to Rule 33 (set forth below) to account for the express commissions received.

On March 6, 7, 8, 9 and 10, Claimant was required to appear as a witness on behalf of Carrier at a court trial held in Ogden, Utah, for which he was compensated for loss of actual wages at the then current rate of $2.55 an hour. Claimant was not reimbursed for the express commission ($69.03) lost as a result of his absence from the station.

This Board is called upon to determine whether or not Claimant is entitled to the express commission under the terms of the Agreement.

The relevant rules of the Agreement are set forth:

"RULE 4.

BASIS OF PAY

Section (a). Except as otherwise provided in this agreement, employes shall be paid on an hourly basis."

"RULE 33.

EXPRESS AND TELEGRAPH COMMISSIONS

Section (a). When express or commercial telegraph commissions are discontinued or created at any office, thereby reducing or increasing the average monthly compensation paid to any position, prompt adjustment of the salary affected shall be made conforming to rates paid for similar positions."

"RULE 34. WITNESSES

Section (a). Employes taken away from their regular assigned duties, on instructions of the Carrier, to attend court, inquest or to appear as witnesses for the Carrier at any investigation shall be furnished transportation and shall be allowed compensation equal to what would have been earned had such interruption not taken place."

Claimant contends that, under the terms of the Agreement, the Carrier is obligated to pay him compensation equal to what he would have earned had the Carrier not required him to appear as a witness in court proceedings on behalf of the Carrier.

Carrier asserts: that the Express Company was not part of the Agreement between the parties; and that Carrier is not required to pay the express commission here involved because of the provisions of Rule 34 (a) as interpreted by a long-standing (63 years) practice on the property.

I.

Carrier vigorously asserts that the court service rule has been interpreted by a 63 year practice; and since the Organization did not deny Carrier's allegations of practice on the property, the allegations must be accepted as true and the claim, therefore, should be denied.

Carrier contends that no denial was ever made by the Organization to a statement made by Mr. L. W. Sloan, Carrier's Assistant Manager of Personnel to Mr. H. D. Smith, Organization's General Chairman, in a letter dated November 23, 1962, as follows:

"As stated to you in conference, no provision of the current agreement requires that claimant be paid the express commission earned by another employe; not only was Rule 34 satisfied when Claimant was paid the amount of his earnings for time and at rate of pay pre-

scribed by current agreement, **but this has also been in keeping with long-standing practice under current and prior agreements for more than 63 years.**" (Emphasis ours.)

Failure to deny the above statement relating to past practice would have in all probability constituted a procedural bar to this claim.

However, an examination of Mr. Smith's response to Mr. Sloan's letter of November 23, 1962 reveals the following:

"I wish to acknowledge receipt of your letter dated November 23, 1962, . . .

Confirming what I stated to you on November 7, I am again calling to your attention Rule 34 (a) which specifically provides for the additional compensation claimed by Mr. Rogers **and the fact that a case of this kind has never come to your attention before.**" (Emphasis ours.)

While it may be conceded that the above language is inartful in its context, we find it is sufficient to constitute a rebuttal to the allegation by Carrier that Rule 34 (a) had been interpreted by a consistent and acquiesced to long-standing practice.

II.

Having determined that the question of past practice is properly before this Board, we next examine the record for probative proof of the existence such practice as an indicator of what the parties intended the court service rule to mean.

While there is no evidence of any specific application of the rule, Carrier asks that we take judicial notice of the fact that over a 63 year period agents in the Claimant's category have been required to attend court and have not been paid express commissions under the rule; and further that Rule 34 (a) was readopted without material change manifesting the intention of the parties in conformity with Carrier's position as to past practice.

On the basis of the record before us, we find that Carrier's assertions as to past practice are insufficient to satisfy the required evidentiary requirements. We are restrained from taking judicial notice by reason of the Organization's contention that "a case of this kind has never come to your [Carrier's] attention before."

Our finding is supported by the holding in Award 7598 (Cluster) as follows:

"Carrier asserts that the practice has long been to pay according to its interpretation, and that no protests have been made although several new agreements were negotiated during this period. Claimant does not admit that the rule has been so interpreted. Carrier submits no evidence of any specific applications of the rule, but rests on a general assertion. On this state of the record, we cannot make a finding, as to the past practice of the parties, but must rely for our decision on the language of the rule itself."

III.

We proceed next to the specific question of whether the term "compensation" as provided in Rule 34 (a) of the Agreement includes express commissions.

As indicated earlier, both parties stipulated that the hourly rate paid to Claimant was adjusted, pursuant to Rule 33, by reason of the fact that he also received express commissions. Absent the opportunity to earn express commissions, Claimant's hourly rate would have been increased.

Thus, Rule 33 (a) explicitly recognizes the relationship between the Railway Express Agency and the Carrier (which is a part owner of the Railway Express Agency) insofar as an employe in Claimant's status is concerned. Thus, when Claimant does work for the express company he benefits the Carrier, even though he is an employe of the latter and not the former.

This is consistent with prior awards of this Board holding that express commissions paid by the express company are part of the compensation for services performed while under the employ of the Carrier.

In Award 392 (Sharfman), this Board stated:

> ". . . The disputes involving express compensation uniformly arise in connection with employes who are serving as joint railway-express agents. Primary employment is with the railroad, but under agreement between the railroad company and the express company, express service is also performed by these employes. Express compensation constitutes a part of the total compensation received by the employes, and this is true whether the express compensation takes the form of percentage commissions or of periodic payments for transfer of other service.
>
> Because of the intimate relationship existing between railroad compensation and express compensation, coupled with the fact that the extent and character of the express service to be performed is necessarily within the general control of the railroad, it has been repeatedly recognized that a sound and realistic adjustment of the relations between the three parties justifies procedure against the railroad company in connection with grievances against the express company. In the instant case not only are all of these grounds for assuming jurisdiction present, as well as the fact that the Southern Pacific Company is part owner of the Railway Express Agency, but in addition the Telegraphers' Agreement to which the Carrier is a party expressly provides, in Rule 33 (c), that 'telegraphers required to serve express or commercial telegraph companies will have the right to complain of unsatisfactory treatment at the hands of said companies and will receive due consideration from the railroad company.' Under these circumstances there can be no doubt whatever that jurisdiction may properly be assumed by this Board. . . ."

And in Award 211 (Garrison), the Board stated:

> "The agent is the employe of the railway company. He is not the employe of the express company, but merely performs services for the

latter on a commission. These commissions are by express terms of the agreement (see Article XIV), a part of the agent's compensation for services to the railroad, and the amount of his wages from the railroad are determined (subject to a certain minimum) by taking into account the amount of probable commissions. Therefore, when the agent handles express he is doing what the railroad company contemplated and is benefiting the railroad company as well as the express company."

We hold that the plain meaning of the term "compensation" as provided in Rule 34 (a) includes express commissions as well as actual wages.

In Award 1123 (Sharfman), the Board, in construing a rule almost identical to Rule 34 (a), held:

". . . Rule 18 (dealing with Attending Court, Investigation, Examinations), which clearly and precisely applies to the facts here involved, embraces by its language, express commissions as well as railway wages. It specifies, in effect, that employes attending investigations, except where they are found to be at fault, 'will be allowed compensation equal to what would have been earned had such interruption not taken place.' The circumstances of this proceeding provide no basis for according to this provision any other than its plainly comprehensive meaning."

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

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

The Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14373, DOCKET TE-14249 (Referee Zumas)

The record in this case establishes that Carrier compensated Claimant in strict conformity with a practice that had prevailed on the Carrier's lines for at least 63 years. The Employes made no showing of a material change in the pertinent rules during that period of time. The award recognizes that under

the applicable rules, such practice should be regarded as controlling, but avoids recognizing the practice in this case by finding that Carrier failed to prove such a practice has existed.

The record conclusively shows that the practice was not denied by the Employes during handling of this claim on the property, and this fact was directed to the attention of the Referee and the Labor Member. The following is quoted from the memorandum which the Carrier Member submitted in this case:

> "Both on the property and in their initial submission to the Board the employes did not deny that Carrier's interpretation of the Rules and payment of claimant in this case are 'in keeping with long-standing practice under current and prior agreements for more than 63 years,' hence that practice must be accepted as controlling and the claim denied.

A. Neither On the Property nor In Their Initial Submission Did the Employes Deny Carrier's Allegations Regarding Practice, and Therefore We Must Accept Those Allegations as True:

On the record before us we have a conclusive showing of a 63-year practice whereby the Agreement has been given the same construction Carrier gave it in the instant case.

At page 22 of the record the Employes have quoted the letter to the General Chairman in which Carrier's highest officer denied this claim on the specific basis that:

> '. . . not only was Rule 34 fully satisfied when claimant was paid the amount of his earnings for time and at rate of pay prescribed by current agreement, but this has also been **in keeping with long-standing practice under current and prior agreements for more than 63 years.**'

(Emphasis ours unless otherwise indicated.)

On the same page the Employes quote response which the General Chairman made to this letter of Carrier's highest officer, and the significant fact is that the General Chairman did not deny, nor question in any way the truth of the assertion regarding these 63 years of past practice. It thus appears that this material allegation of Carrier on the property went undenied by the Employes.

Attention is now directed to page 11 of the record where the Employes outline the position taken by Carrier on the property. Paragraph 2 of the Employes' statement of Carrier's position on the property is an exact quote of the paragraph from the letter of Carrier's highest officer which we have cited above and which expressly bases the defense of Carrier on Rule 34 and a past practice of more than 63 years.

Significantly, the Employes do not, at any point in their initial submission, deny this allegation of practice.

On these facts, we must accept Carrier's allegation that Carrier's interpretation of Rule 34 in the instant case is supported by 63 years of consistent past practice. This Board has consistently ruled that under our procedures a material allegation which is not denied at the appropriate time, must be accepted as true.

AWARD 9261 (Hornbeck)

'Of course, many submissions proceed upon ex parte statements only and, when material statements are made by one party and admitted or not denied by the other they may be accepted as established facts . . .'

AWARD 11236 (Sheridan)

'The Organization did not choose to deny or rebut the denial of the Carrier, therefore Carrier's assertions remain unchallenged, and we assume that Carrier's allegations are true.'

AWARD 11398 (Moore)

'. . . They further contend that the agreement with the C&O cannot be considered because a copy was not submitted as required by Circular No. 1. The Petitioner did not deny the existence of the Agreement, therefore it was not necessary for the Carrier to prove the terms and existence of the Agreement.'

AWARD 11660 (Dolnick)

'A failure to categorically deny Carrier's allegations . . . raises the presumption that it is correct.'

In their rebuttal, the Employes belatedly seek to avoid the controlling effect of the past practice by resorting to two different inexcusable contentions. The first of these contentions is that Carrier did not raise the past practice issue on the property. At page 42 the Employes assert:

> **'Page 4, middle of page:** The Carrier among other things alleges that: 'Such practice of paying only wages at the agreed-upon rate of pay lost by the employes due to having been absent from his position under Rule 34 (a) has been of long standing on this property without protest provided for in Rule 33 (c), since the first telegrapher agreement was signed September 1, 1899, or for more than 63 years' **No such defense was raised by the Carrier during the handling of this dispute on the property.** The Employes, therefore, respectfully request that the foregoing self-serving statement, unsupported by any evidence, be summarily dismissed from these proceedings. Your Board on this point said in Award 8484 (Vokoun):
>
> > . . . The Board has diligently protected the parties, both the Carrier and Organization, in the

presentation of their case on appeal to the Board in limiting claims to those discussed on the property and limiting the defenses interposed so that there can be no enlargement, or in lay language, no second look after the case is concluded on the property.'"

"The rule stated in Award 8484 is certainly sound, and it is certainly applicable in this case as a bar against the Employes' belated attempt to challenge the existence of the 63-year-old practice. The Employes' own submission conclusively establishes that Carrier did raise the past practice issue on the property and the Employes acquiesced therein by failing to take issue with Carrier on that point. They are now barred from taking issue with Carrier in their rebuttal statement. Our rules of procedure forbid it. In addition to Circular No. 1 and Section 3, First (i) of the Railway Labor Act, this Division adopted the following motion on November 26, 1957:

'Moved that, in its first submission, each party to a dispute shall set forth the **complete dispute** in conformity with Section 3, First (i) of the Railway Labor Act and Circular No. 1 of the Board. (Adopted — November 26, 1957.)'

In their initial submission the Employes indicated that Carrier had based its defense on the 63-year-old practice. Had they intended to take issue with that defense, it was their absolute obligation to do so in their initial submission, under this rule. Furthermore, it was their absolute obligation to take issue with Carrier on the point when Carrier raised it on the property. Having failed to deny Carrier's allegations on the property, they were precluded from doing so before the Board.

AWARD 10789 (Ray)

'It is a well established rule that this Board will not consider contentions or charges which were not made during the handling of the case on the property. Award 5469 (Carter). Hence the contention concerning the violation of the Agreement must be rejected.'

AWARD 8324 (McCoy)

'. . . But it is well settled by our awards that new issues not raised on the property, . . . cannot be considered by this Board. Awards Nos., 1485, 3950, 5095, 5457, 5469, 6657, 7036, 7601, 7785, 7848, 7850 . . .'

The Employes were certainly precluded from laying back until their rebuttal and then, for the first time, denying Carrier's allegations regarding practice; and of this there can be no doubt.

B. The Established Practice Of 63-Years' Duration During Which the Rule was Re-adopted Without Material Change is Controlling With Respect To the Intent Of the Agreement:

The Employes base their claim squarely upon Rule 34(a) of the Agreement which is quoted repeatedly in the record. The material por-

tion of this rule is in all material respects the same as Rule 34 of the prior Agreement between the parties. See Rule 34 of the Agreement of September 1, 1927 (file copy of said Agreement is submitted herewith). The material portion of Rule 34 of the prior Agreement reads:

> 'Employes taken away from their regular assigned duties, at the request of the management, to attend court or to appear as witnesses for the Carrier will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place . . .'

In addition to Rule 34 (a), the Employes rely heavily on an early award of this Board involving another Carrier, namely Award 1123 wherein it was held that on said Carrier under a rule somewhat similar to Rule 34 express commissions should be included in pay for attending an investigation.

The record presented to us is therefore on all four with the record presented to the Board in **Award 10381 (Dugan)** where the Board ruled:

> 'In Award No. 621 this Board held: * * *
>
> **Under this holding of the Board the Claimant would be entitled to pay for the regularly scheduled trips for the month involved. However, in the instant case on this particular railroad it has been the practice since 1938,** some twenty-four years, to permit the Carrier to hold out a porter from a regularly scheduled trip to prevent overtime. **As this Board held in Award No. 8538:**
>
> > **When a collective bargaining agreement is consummated and existing practices are not abrogated or changed by its terms, these existing practices are just as valid and enforceable as if authorized by the agreement itself,** and particularly where as here an existing practice is sought to be changed.
>
> See also Award No. 5747 and many other decisions of this Board for the same holdings.'

The foregoing decision not only represents sound contract law, but it correctly states the rule that has been consistently followed by this Board. For other recent cases applying the rule as stated above, see Awards 12827 (McGovern), 11647 (Dolnick), 10949 (Ray), 10937 (McMahon), 10785 (Mitchell), 10683 (Moore), 10585 (Russell), 8538 (Coburn), among many others.

In view of the clear past practice of 63-years' duration, which went undenied by the Employes both on the property and in their initial submission and which indicates that the procedure followed by Carrier in compensating Claimant in the instant case is proper, the claim must be denied."

In view of the wording of the rule, plus the additional fact that even without the express commissions Claimant and other agents in his position receive more for attending court than many other employes of the same craft, the practice was a permissible, reasonable interpretation of the Agreement.

The finding in this award that Carrier's statement of past practice was inferentially denied by the General Chairman's statement to a Carrier that "a case of this kind has never come to your attention before" is manifestly erroneous. At no place in the record did the Employes assert that this statement of the General Chairman could be regarded as a denial of Carrier's assertion concerning past practice. The Employes had a full opportunity to defend themselves on that ground and from their silence we must assume they could not see in this statement of the General Chairman any denial. Instead of denying Carrier's assertion regarding practice and making a concrete statement on that subject, the Employes resorted to the indefensible technique of requesting the Board to ignore the past practice issue on the obviously and admittedly false premise that Carrier had not raised such an issue during handling on the property. We see no justification for resorting to tenuous logic and strained interpretations in order to give the Employes a defense which they themselves did not assert in the record.

We dissent.

G. L. Naylor
R. A. DeRossett
C. H. Manoogian
W. M. Roberts

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