Award No. 14580
Docket No. TE-13404

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.
and
THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake and Ohio Railway (Chesapeake District), that:

1. The Railway Express Agency, Inc., and the Chesapeake and Ohio Railway, joint and severally violated or were a party to violating the terms of an Agreement between the parties hereto when effective June 15, 1960 they or it arbitrarily and unilaterally separated the joint railway and express agencies at Wellston, Ohio.

2. The Railway Express Agency and/or the Chesapeake and Ohio Railway shall, because of the violation set out in Item 1 hereof, restore the express agency at Wellston, Ohio to its status prior to June 15, 1960; and compensate Agent H. M. Booth, or his successor, an amount equal to all commissions that would have accrued to him had the agencies not been improperly separated, until such time as some mutually agreed to method of disposing of the issue in this controversy is reached by the parties to this dispute. A check of the express records shall be made for the purpose of determining the amount of compensation due.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement, effective September 1, 1916, as to rules, commission rates and transfer salaries, between The Order of Railroad Telegraphers and Railway Express Agency, Incorporated, parties to this dispute. There is also an Agreement, effective September 1, 1949 and as amended, between The Order of Railroad Telegraphers and the Chesapeake and Ohio Railway Company (Chesapeake District), parties to this dispute.

The joint Railway-Express Agency at Wellston, Ohio is covered by each of the above referred-to Agreements.

OPINION OF BOARD: This claim is brought by the Order of Railroad Telegraphers against both the Railway Express Agency, Inc. and the Chesapeake and Ohio Railway Company.

In 1953 a joint Railway Express Agency was established in the C&O Station at Wellston, Ohio. Effective June 15, 1960, the business of this agency commenced to be performed at Jackson, Ohio, 9.5 miles from Wellston. The Express Agency at Jackson extended its express pick-up and delivery service to and including the territory of Wellston.

Atricle 10 of a 1916 Memorandum entered into by the Organization and the Adams Express Company, provided:

> "Joint Railway and Express agencies herein represented will not be separated unless mutually agreed between the Company and the Committee representing the Express Agents."

The Chesapeake and Ohio Railway Company has entered what amounts to a general demurrer to the Employes' Ex Parte Submission. The demurrer is sustained and the Chesapeake and Ohio Railway Company is hereby dismissed from this litigation as a party respondent.

The Railway Express Agency, now the REA Express, and a successor of the Adams Express Company, sets up three specific grounds as defense to the claim:

> "It is the position of Railway Express Agency that:
>
> (1) Claimant is not its employe and, therefore, the Board has no jurisdiction to decide this dispute.
>
> (2) There is not now, nor has there ever been, an agreement between Railway Express Agency and The Order of Railroad Telegraphers on The Chesapeake and Ohio Railway and there is, therefore, no agreement for the Board to interpret or apply, and hence no basis on which to sustain the claim.
>
> (3) Even if the Board should find that it has jurisdiction to decide this dispute and that there is an agreement between Railway Express Agency and The Order of Railroad Telegraphers, there is no merit to the claim and it should be denied."

In regard to the first position, we are persuaded that this issue was settled against the respondent by the United States Supreme Court in Order of Railroad Telegraphers vs. Railway Express Agency, Inc. (321 U.S. 342-349) (1944).

The second position of the REA Express was likewise ruled on by this Board in Award 13164.

With these two contentions settled to our satisfaction by the precedents cited, we will take up the remaining defense of the respondent.

In support of the third proposition the REA Express first urges that Wellston could not have been covered by the 1916 Adams Memorandum because the C&O agent at Wellston did not begin handling express until 1953. We believe that the agreements entered into in this industry are fluid enough to encompass newly created positions which come within the limits of the prior agreement. It is not reasonable to assume that agreements are made only to apply to conditions existing at the instant they are signed. There is

no distinguishing characteristic in this case which would lead us to believe that Wellston is in any other category than the one cited by the Organization.

Secondly the REA Express argues that it did not separate Wellston, it in fact abolished the agency. In this particular case this seems to be a distinction without a difference. In looking at this aspect of the claim, the end result would seem to control our thinking. Once the REA Express agrees not to "separate" the agency without mutual agreement, then it seems that to merely "abolish" the agency by moving it 9.5 miles, and serving the same prior territory, is to do indirectly what is not allowed to be done directly.

We are therefore of the opinion that the REA Express has failed to sustain any of its defenses to this claim.

The Organization demands that the express agency at Wellston, Ohio be restored to its status prior to June 15, 1960. The REA Express urges that this Board lacks the authority to restore said position. We are of the opinion that we should not order such a restoration because this decision is being written six years after the incident involved, and we do not know the conditions existing at Wellston today. It is considered fundamental, however, that where there is a wrong there is a remedy. In this particular case we do not feel that restoration would be the proper remedy.

It is our decision that the Claimant Booth be compensated by the REA Express for an amount equal to all commissions which would have accrued to him between June 15, 1960 and such time as some mutually agreed to method of disposing the issue in this controversy is reached by the Organization and the REA Express.

For the purpose of determining compensation, we hold that a joint check of the express company's records shall be made. We note the company's exception to this ruling, and reply that the knowledge sought is peculiarly within the province of the express company and the Organization is without fault in failing to plead and prove a sum certain.

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

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of June 1966.

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