NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20705
THIRD DIVISION Docket Number CL-20394

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Chesapeake and Ohio Railway Company
and
(REA Express

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7357) that:

1. REA Express and the Chesapeake and Ohio Railway Co., joint and severally violated or were a party to violating the terms of the agreement between the parties hereto when effective Oct. 29, 1971, they or it arbitrarily and unilaterally separated the joint railway and express agencies at Ronceverte, West Va.

2. REA Express and/or The Chesapeake and Ohio Railway, shall, because of the violation set out in Item 1 hereof, restore the express agency at Ronceverte, West Va., to its status prior to Oct. 29, 1971 and compensate Agent R. T. Bowden, 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.

OPINION OF BOARD: On October 8, 1971 REA Express notified the Organization that it was removing its express accounts from twenty C&O stations, including Ronceverte, West Virginia; and identified the reason for such action was that the C&O Railway required REA Express to remove its accounts from said stations. A letter from the C&O to REA Express, dated September 16, 1971, shows that the C&O Railway required REA Express to make arrangements to remove its accounts at five locations in West Virginia, including Ronceverte.

The employment relationship at Ronceverte is commonly known as a joint agency, in that the C&O agent is also agent for REA Express. The agent is paid by the C&O and in addition the agent received a commission for handling REA Express business. After the removal of express accounts, the job was not abolished by the C&O Railway and the agent at Ronceverte did exclusively C&O work; REA Express did not abolish its agency in Ronceverte, and the express work continues to be handled there by a merchant agent.

Article 10 of the 1916 Agreement entered into by the Organization and the Adams Express Co. 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."

In Award 14580 involving this Organization, REA Inc. and the C&O Railway, the award dismissed the C&O as a party respondent. The reason is clear. It was the unilateral action on the part of REA, and no fault of the C&O, that caused the joint agency in that situation to be separated. Award 14580 found that REA had in fact violated Article 10 when it separated the joint agency without mutual agreement as required by the 1916 Agreement. In the present case, the record shows that it was the C&O Railway that was responsible for separating the joint agency at Ronceverte, West Virginia. It is clear that REA Express and its predecessors could not unilaterally separate its express traffic from the joint agency. The issue before us then is can the C&O unilaterally separate the joint agency. Crucial to resolving this issue is the status of the C&O as it relates to the 1916 Agreement.

First: There can be no doubt that REA Express and the BRAC continue to be governed by the 1916 Agreement. See Awards 13164, 14580, 18660.

Second: It is abundantly clear that the unilateral action of the C&O Railway had the sure and certain effect of destroying the 1916 Agreement as it relates to the circumstances of this case.

Third: The C&O Railway had certain knowledge of the 1916 Agreement. In addition to the Carrier's admitted awareness of the 1916 Agreement as of Award 785, the Carrier has been continuously aware of the 1916 Agreement because it has been a party to disputes involving this Agreement before the NRAB as well as the National Mediation Board. Award 13164 involved the 1916 Agreement and the same parties to this action or their predecessors. In Award 14580 the C&O was a respondant to an action for unilaterally separating a joint agency, and, as explained above, the Award dismissed the C&O as a party defendant, because it was REA, Inc. and not the C&O that had caused the separation of the joint agency. Further, for over 55 years the C&O telegraphers handled express for the Adams Express Co. and its successors with the absolute consent of the C&O. Indeed the C&O has made the handling of express business a part of the working conditions of its BRAC employees: and indeed rates of pay, (before the unilateral action of the C&O precipitated the separation of the joint agency), were conditioned by the handling of express (REA Express) and associated commissions.

Fourth: The BRAC agent suffered damages. Express commissions had been an essential factor in the earnings of the agent, in addition to his C&O salary. The agent at Ronceverte has not received such commissions because of the C&O action.

Fifth: The C&O Railway was put on notice in Award 13164 that this Board would not tolerate the weakening of the relationship of the joint agents, and the C&O Railway and REA. Award 13164, between the very same parties or their predecessors, and dealing with the issue of certain commissions and joint agents, specifically accepted the views of Award 298:

> "In any event, we think that claimant is a joint employe of the railroad and the Agency and he may bring his claim to this Board either against the railroad or the Agency, or both, as he had done. We agree specifically with the views of the Board in Award 298 that:
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> 'From whatever point of view regarded, the relationship between any given Railway, The Railway Express Agency, Inc., and the joint agent who works on that railway, is a triangle no side of which can be removed or weakened without considering what the result will be to the other two sides.
>
> If this Board is legally empowered to clarify the respective rights and responsibilites of the parties to this three cornered arrangement, it will probably be better in the long run for all concerned to have that done than it will for them to be continuously involved in needless disputes....
>
> As long as a railway company and the Railway Express Agency, Inc., are in a position to shift responsibility back and forth they will be under strong pressure to do so with the result that the purposes of the amended Railway Labor Act, in respect to this three cornered relationship will be impeded.'"

Clearly the C&O Railway removed its part of the triangle and thereby caused the reduction of monthly compensation to the agent at Ronceverte by the amount of commission he would have received for doing REA Express business. The fact that REA, Inc. was sold by the railroads to private individuals and became REA Express as of August 20, 1969 while having an impact on the legal relationship of REA and the C&O Railway, it did not serve to legally break the triangle. The employees status remained unchanged. The 1916 Agreement continued and required that there be no separation of joint agencies unless the parties mutually agree. The C&O continued to have the obligation not to interfere with, weaken or remove their part of the triangle. Award 298 (Hotchkiss) referred to above, which was sustained by the U.S. Supreme Court in 321 U.S. 342 contains persuasive language relevant to this point:

"The salient fact is that express commissions are inextricably interwoven with the wages which railways contract to pay agents. (emphasis added) It must, therefore, be held especially in view of the close property relationships between the railways and the Railway Express Agency, Inc., that the Railway by which an agent is primarily employed and the Railway Express Agency, Inc., by which he is secondarily employed, are jointly and severally obligated to maintain the wage structure of agreements, insofar as express commissions are found to be an essential factor in determining the wages to be paid by the railway. In the judgment of the Referee, this ruling would be sound even though the railways and the Railway Express Agency, Inc., were not, in these corporate relationships, as closely interwoven as they are...." (emphasis added)

Sixth: Argument that Rule 3 of the Telegrapher Agreement No. 11, was the only contractual prohibition restricting the managerial perogatives of the C&O Railway in its relations to joint agencies must be rejected. This Board cannot agree that Rule 3 dealing with the discontinuance or creation of milk, express, or Western Union commissions at any office is applicable to the fact situation in this present case. In addition to the previous analysis in this opinion that stipulates that the C&O Railway has an obligation not to interfere with, weaken or remove their part of the triangle, it cannot be reasonably contemplated that the discontinuance of all express commissions from 20 positions, thus affecting the compensation of 20 positions, where the express work still remains to be performed, is governed solely by Rule 3. Such conduct on the part of the C&O Railway is a change in "rates of pay" and should have been handled under Section 6 of the Railway Labor Act.

We find then that the C&O Railway is primarily responsible for the separation of the joint agency; and that the C&O thus shall be responsible to compensate Agent R. T. Bowden or his successor, an amount equal to all commissions that would have accrued to him had the agency not been improperly separated; and this payment shall continue to the date the C&O serves notice to REA Express that the C&O has rescinded its notice to REA Express to remove express accounts. As of the date such notice is received by REA Express, REA Express shall immediately restore its express accounts to the C&O facility at Ronceverte and thus recreate the joint agency or REA Express alone will be responsible for continuing loss of commissions thereafter, until the agency is properly restored or until such time as some mutually agreed to method of disposing of the issue is reached by the parties to this dispute.

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 Agreement was violated.

A W A R D

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April 1975.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20705 -
DOCKET NO. CL-20394 - (REFEREE TWOMEY)
COVERING THE CHESAPEAKE AND OHIO RAILWAY CO.

The Referee completely ignored the facts of record, the claim as made and the undisputed evidence in this case. The claim, throughout the entire handling on the property, was progressed by BRAC on an alleged violation of Article 10 of the Adams Express Agreement of September 1, 1916. This was the sole contention of the employes on the property.

It is a fact that The Chesapeake and Ohio Railway Company was not a party to the Adams Express Agreement. Even though The Chesapeake and Ohio Railway Company advised Railway Express that the Railway Company would no longer permit its clerical employes to engage in express work while being paid for services rendered for the Carrier does not alter the fact that the Adams Express Agreement a negotiated agreement between REA Express and the Organization, provided a remed for the separation of joint Railway and Express Agencies. Article 10 specificall provides that the Organization and Railway Express would mutually agree on the separation of the Express work. The employes argued in their submission that they made numerous requests of REA that they reach a mutual agreement on the separation of the REA work at Ronceverte, but, REA failed to attempt to negotiate the problem. The Chesapeake and Ohio Railway Company had no obligation under the Adams Express Agreement or the Clerks Agreement in effect on the Railway property to reach a mutual agreement in connection with this work.

The Referee far exceeded his authority and jurisdiction in rendering the decision in Award No. 20705. He completely disregarded the claim as made before the Third Division which clearly stated the claim was based on a violation of the Adams Express Agreement. The Referee held in his "Opinion of Board" that:

> "* * * There can be no doubt that REA Express and the BRAC continue to be governed by the 1916 Agreement. * * *"

We agree with the conclusion in Item "First", however, this does not singularly involve the C&O. Based on this conclusion alone, The Chesapeake and Ohio Railway Company should have been dismissed as a party respondent as was done in Award No. 14580. The conclusion reached by the Referee is not a valid conclusion nor a conclusion based on fact. The Adams Express Agreement of 1916 was not destroyed as a result of the discontinuance of express handling at Ronceverte, this Agreement remained in effect between REA and BRAC, and the discontinuance of such express was merely the termination of an understanding between C&O and REA. The obligation continues between REA and BRAC under the Adams Express Agreement of 1916 and the obligation of C&O and BRAC under Rule 3 of the C&O Agreement continues. C&O by being aware of the Adams Express Agreement does not bind it or impose liability by long association. On the contrary, the results of that arrangement prove that C&O was not a party and hence not liable.

The Referee exceeded his authority and jurisdiction by expanding on the claim and not rendering a decision solely confined to the claim as presented to

this tribunal. The claim as made was based on an alleged violation of Article 10 of the Adams Express Agreement. The Referee's decision must be confined to the claim as made and this he failed to do, thus exceeding his authority and jurisdiction. Award Nos. 12302, 14981, among others.

Even assuming there was a triangle of which the C&O was a part, as theorized by the Referee, the contracts between the parties must be controlling if it disposes of the issue. In applying this theory, which we hold improper, the Referee would have had to determine a violation of Article 10 of the Agreement between BRAC and REA and a violation of Rule 3 between BRAC and the C&O. This is the only basis on which the Referee could render damages in the instant case.

The limit of the Referee's authority in this case was to determine if there was a violation of Article 10 of the Adams Express Agreement of September 1 1916. If the conclusion reached is that there was such a violation, then the Ref eree can only order the parties to the Agreement to comply with the Rule. Articl 10 states that REA and the organization will mutually agree on the separation of the Joint Railway and Express Agencies and the rule does not provide a penalty fo failing to mutually agree. Based on the record, REA and the organization made no attempt to reach an agreement on the separation of this work and the limit of the Referee's authority in rendering a decision on the claim as made is to require th parties to the Adams Express Agreement (REA and BRAC) to attempt to reach a mutua agreement on the separation of the work.

The Referee expanded on the claim as made by going beyond the questic whether the C&O violated the Adams Express Agreement when he held that the C&O wa in some manner responsible for REA violating the Adams Express Agreement. The C& did not violate the Adams Express Agreement nor was it responsible for violation Article 10 thereof. The C&O's action did not in any manner prohibit REA Express and BRAC from reaching a mutual agreement under Article 10. Neither the Third Division nor the Referee is legally empowered to clarify the respective rights and responsibilities of the third party (The Railway Company) under the Adams Express Agreement when such third party is not and never has been a signatory party to such agreement. Award Nos. 9658, 11126, among others.

The logic of the Referee, that Rule 3 of the Agreement between BRAC and C&O is not applicable and the conduct of the C&O constitutes a change in rate of pay which should have been handled under Section 6 of the Railway Labor Act, is not supported by the facts of record in this case. Rule 3 is a negotiated rule between BRAC and C&O under Section 6 of the Railway Labor Act and provides for "change in rates of pay" when express commissions are discontinued. The Referee fails to submit any basis as to why he concludes Rule 3 has no application. It has been applied in this fashion on the C&O for many years and this was the reaso for negotiating Rule 3. The employes themselves cited Rule 3 insofar as the C&O is concerned.

The Referee fails to take into consideration that the discontinuance of express on the twenty (20) positions referred to in his "Opinion of Board" we handled by BRAC with C&O and, in some cases, rates of such positions increase in accordance with Rule 3 of Agreement between BRAC and C&O. The answer to the ex situation is for BRAC to negotiate a new rate as provided in Rule 3 of the C&O Agreement. This is the reason for the existence of Rule 3.

While the BRAC Agent may have suffered damages, his recourse is under Rule 3, which provides for increase in rate of pay under these circumstances. This is the basis for Rule 3. The Agent is no longer performing the work and the Referee cannot eliminate the application of this rule and render damages stating that he should be paid commissions when no such work is actually performed and Rule 3 governs. The Referee has far exceeded his authority and jurisdiction in imposing such damages. Award Nos. 3651, 12824, among others.

The employes in their own Ex Parte Submission before this Board and before this Referee clearly stated at page 15 thereof that:

> "In conclusion, the Employes respectfully submit that the question for this Board to decide is did REA separate its Joint Agency at Ronceverte, West Virginia, without mutual agreement? * * *" (Emphasis added)

It is obvious that the Referee failed to confine himself to the issues in this case and the claim as made.

Without relinquishing its argument with respect to the foregoing, it should be pointed out that the Referee in rendering such decision erred and did not even apply the theory of damages set forth by the U. S. Supreme Court in 321 U. S. 342, wherein it was held that the Railway and REA Express, are "jointly and severally obligated to maintain the wage structure," even though he cited such case in arriving at his conclusions. Rule 3 is the only rational, legal and prop way to resolve this controversy.

In conclusion, it is obvious that the Referee clearly exceeded his authority and jurisdiction, and did not decide the claim as made and presented befo this tribunal. To say the least, this Award is palpably erroneous and without au thority, and we must vigorously dissent.

H. F. M. Braidwood

P. C. Carter

W. F. Euker

G. L. Naylor

G. M. Youhn