Award Number 316
Docket Number TE-203

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE.—

"Claim of the General Committee of the Order of Railroad Telegraphers, Southern Pacific Company (Pacific Lines), that telegraphers required to handle the business and accounts of the Pacific Motor Transport Company shall be paid additional compensation therefor."

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

The parties to said dispute were given due notice of hearing thereon.

As a result of deadlock, Willard E. Hotchkiss was appointed as Referee and at the request of the carrier a second hearing was held on July 1, 1936, at which the parties argued the case before the division with the referee sitting as a member thereof.

An agreement bearing effective date of September 1, 1927, as to rules and regulations, and May 1, 1927, as to rates of pay, is in effect between the parties.

HISTORY OF THE CASE.—The Southern Pacific Company is a corporation organized under the laws of Kentucky and therefore a foreign corporation in California. The laws of California prohibit a foreign corporation from operating motor trucks for transportation of intrastate shipments for hire within the state. In order to meet the competition of motor trucks to which the carrier had lost much business in recent years, carrier desired to inaugurate motor transport service including pick up and delivery service for intrastate shipments. Being unable to do this directly under California law, carrier organized on March 11, 1929, a California corporation called the Pacific Electric Motor Transport Company. Later, in connection with the extension of the service of the corporation to a larger portion of the territory served by Southern Pacific Company (Pacific Lines) and to indicate better the scope of its operation, the name of the company was changed to the Pacific Motor Transport Company.

The Public Utilities Act of California provides that the term "express corporation" within the meaning of the Act includes every corporation, etc., engaged in transporting freight, merchandise, or other property for compensation on the line of any common carrier, stage, or auto stage line within the state. Therefore, within the purview of the Public Utility law of California the Pacific Motor Transport Company is an express company.

The Pacific Motor Transport Company is entirely owned and controlled by the carrier. Under contract between the Pacific Motor Transport Company and the carrier the transport company maintains pick-up and delivery service both for shipments which are handled entirely by transport company and for shipments which are handled partly by the Transport Company and partly by the Southern Pacific Company.

In response to the claim, the carrier calls attention to the fact that the Pacific Motor Transport Company accepts freight only under the uniform straight bill of lading adopted by carriers in Official, Southern, and Western Classification territories, and maintains that this is conclusive evidence that the Motor Transport Company is in fact a freight carrier and not an express

carrier, although under the Public Utility law of California it is compelled to be designated as an express company.

It appears that the service of the Pacific Motor Transport Company was inaugurated on different divisions and at different points at different times, and petitioners point out that in 1931 installation of its system of accounts for handling the business was begun in a general way and gradually extended over the system. This case originated January 8, 1931; the employees brought it before the System Telegraphers' Adjustment Board but the carrier declined to permit the case to be heard by the Board on the ground that it was a request for a change in rates of pay, a subject not under the jurisdiction of that Board.

The case was then submitted, ex parte, to the United States Board of Mediation on December 6, 1932, and was discussed in conference before Mediator, the late John Williams, beginning January 24, 1932, and ending February 8, 1933. It appears that no further action was taken upon the case until after the passage of the Amended Railway Labor Act on June 21, 1934.

On August 28, 1934, petitioners advised the carrier that the National Mediation Board, established by the Amended Railway Labor Act, had filed request with the President of the O. R. T. that he withdraw the case from Mediation and had suggested that it should be disposed of either through agreement in conference or by appeal to the National Railroad Adjustment Board. The representative of the petitioners advised the carrier that the case had been so withdrawn. On October 1, 1934, Mr. George A. Cook, Secretary of the National Mediation Board, advised Mr. J. H. Dyer, Vice President of the Southern Pacific Company, that the case was being taken off the open docket of the Board.

Chronologically, the next item in the record is a request by petitioners on October 31, 1934, that the case be listed for consideration in conference to be held beginning November 5th. On November 7, 1934, petitioners noted a conference in which no change in position of parties occurred and on November 30, 1934, they noted that carrier's representative declined to give any consideration to the claim.

The next item in the record is a letter of January 10, 1935, in which General Chairman Pritchett requests Supervisor of Wage Schedules Beach to join in a statement of facts to this Division, which request was declined in letter from Mr. Beach to Mr. Pritchett dated January 24, 1935.

On August 19, 1935, petitioners made an ex parte submission of the case with an extended statement of their position and the following exhibits: "A," page from "Local Express Tariff No. 6-A, Index of Commodities—Continued, effective July 1, 1934, issued by L. R. Young, V. P. & G. M."; "B," blank Notice of Arrival of Express, etc.; "C," blank Express Bill; "D," blank used in C. O. D. shipments.

Carrier's response contains a detailed account of the circumstances attending the development of the Pacific Motor Transport Company and an outline of carrier's jurisdictional and factual position, supported by the following exhibits: A 1-6, correspondence concerning the claim from February 9 to April 16, 1932; B-1, ex parte statement of Question, of Facts, and Contention of Employes to Telegraphers' Adjustment Board, April 28, 1932; B-2, letter from Mr. Beach to Mr. D. Slater, Chairman of said Board, dated April 30, 1932, challenging jurisdiction of said Board; B-3, finding of said Board October 8, 1932, that Board cannot take jurisdiction; C, application for mediation dated December 6, 1932; C-1, letter, Pritchett to Beach, August 28, 1934, advising of withdrawal of case from mediation on advice of Chairman of Mediation Board; C-2, letter from Secretary Cook of Mediation Board to Vice President Dyer of the Southern Pacific Company, October 1, 1934, advising of removal of case from docket of Mediation Board; D-1, letter, Pritchett to Beach, January 10, 1934, requesting carrier to join in Statement of Facts to this Division; D-2, letter, Beach to Pritchett, January 24, 1934, declining to join in Statement of Facts.

Petitioners submitted a Rebuttal Brief on October 20, 1935, to which the carrier presented a bill of exceptions. The case was argued before the Division on October 31, 1935, and on December 11, 1935, carrier submitted a surrebuttal, to which, on December 27, 1935, petitioners submitted a rejoinder with the following exhibits: "E," letter, Pritchett to Beach, August 28, 1934, above noted; "F," letter, Pritchett to Beach, October 31, 1934, to-wit: "With reference to conference beginning on November 5th between yourself, Vice President Lewis of

the Organization, and the undersigned, I desire to list the following cases: * * * Pacific Motor Transport question, no file. * * *"; "G," Memorandum by Mr. Pritchett of conference November 7, 1934, in which there was no change in position of the parties; "H," memorandum by Mr. Pritchett November 30, 1934, noting that Mr. Beach declined to give any consideration to claim.

POSITION OF PETITIONERS.—Petitioners base their claim on Rule 33 (c) of the agreement, to-wit:

> "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."

Petitioners maintain that the Pacific Motor Transport Company is an express carrier in fact as well as name and that the Southern Pacific Company has required their agents to handle the business and accounts of the Transport Company, thus placing upon them much additional work and a new and additional line of responsibility.

Petitioners point out that no commissions are allowed agents who handle this work, notwithstanding that similar work performed for the Railway Express Agency, Inc., is paid for, either in form of commissions or salary, in addition to the salary paid by the carrier.

In support of their contentions, petitioners cite numerous instructions to agents in respect to the handling of this business, including specific details as to how different types of shipments shall be handled. In further support of the contention that the Pacific Motor Transport Company, although owned by the Southern Pacific Company, is in fact a separate organization, petitioners cite a letter dated at Stockton, October 6, 1930, signed by Mr. L. R. Smith, Assistant Superintendent of the Southern Pacific Company, showing that the Southern Pacific Company bills the Pacific Motor Transport Company for the time consumed by employees of the Southern Pacific Company in performing service for the transport company. They also cite an excerpt from another letter dated San Francisco, November 12, 1931, signed by E. J. McSweeney, Assistant Manager of the Pacific Motor Transport Company, to-wit:

> "The Pacific Motor Transport Company operations over the lines of the Southern Pacific Company from San Francisco and other points has proven very successful; therefore, it is our intention to establish this service to many other stations, and will appreciate your cooperation in assisting us in making a contract with your local drayman.
>
> "The Pacific Motor Transport Company is a subsidiary of the S. P. Co., but operates as an independent unit from the parent company, although the S. P. Agent is a joint agent of the P. M. T. Co. and S. P. Co. The accounts and all transactions are separate from the railroad accounts, and we use our own tariffs which are lawfully on file with the California Railroad Commission."

Petitioners further maintain that the service of the Transport Company has not only resulted in the heavy increase in duties and responsibilities of agents but has also resulted in a diversion of business from the Railway Express Agency, Inc., and thus caused the employees to suffer a loss in commissions, and they maintain that the same consideration is due the employees required to act as joint agents for the Southern Pacific Company and the Pacific Motor Transport Company as is given to joint agents of the carrier and the Railway Express Agency, Inc.

In respect to the previous handling of the case by the United States Board of Mediation, the petitioners in a subsequent brief maintain that the case now pending before this Board is being presented as a new case, consideration of it by the Mediation Board having terminated, and in support of this fact they point out that cases involved in Award Nos. 119 and 120, cited by the carrier at the hearings, were not handled with the carrier after being withdrawn from the Mediation Board. They submit also that the committee handled the case from its inception as a grievance under Rule 33 (c).

POSITION OF THE CARRIER.—Carrier maintains that the business in which the Pacific Motor Transport Company is engaged is indubitably freight business. Carrier also maintains that the provisions of the Railway Labor Act do not apply due to the fact that the transport company and its connection with the Southern Pacific Company involve trucking service which is excluded from

the purview of the Act. It also maintains that the business is excluded by virtue of the fact that it is exclusively intrastate business.

The carrier further maintains that the claim is a request for a change in rates of pay, rules, and working conditions, and cites the submission to the U. S. Board of Mediation as evidence of this fact and of the fact that the claim involves subject matter over which the National Railroad Adjustment Board cannot legally assume jurisdiction.

Carrier further cites Award No. 119, Docket CL–135, in which Referee Samuell declined jurisdiction of a case withdrawn from Mediation because it had not been handled to a conclusion by the Mediation Board. In arguing the case it was urged in further support of this contention that a further amendment to the Railway Labor Act in respect to air carriers specifically stipulates that all disputes referred to the National Labor Relations Board over which the latter had taken jurisdiction which remained unsettled on date of approval of the Amendment shall be handled to a conclusion by the Mediation Board.

The carrier also contends that if the petitioners' contention that this is express business were upheld and commissions allowed, a reduction of rates of pay downward under Rule 33 (a) would be required.

Carrier summarizes contentions as follows:

> "1st. That the claim is for a change in rates of pay, rules, and working conditions.
>
> "2nd. That the National Railroad Adjustment Board, Third Division, cannot legally assume jurisdiction of the case.
>
> "3rd. That the claim is indefinite, ambiguous, and does not set forth either the nature or the extent of the claim.
>
> "4th. That the carrier is not obligated by agreement with the Order of Railroad Telegraphers to pay either commissions or additional wages to employees for performing the work which is the subject matter of this claim.
>
> "5th. That the Pacific Motor Transport Company is, in fact, a freight carrier and not an express carrier.
>
> "6th. That no rules of the Telegraphers' Agreement are involved.
>
> "7th. That no rules of the Telegraphers' Agreement have been violated.
>
> "8th. That the employes involved in this case are employes of the carrier and the work they perform (which is the subject matter of this case) is service and work of the carrier, party to this case.
>
> "9th. That if the claim is sustained by a decision of the National Railroad Adjustment Board, Third Division, that such decision would be illegal and unenforceable."

In later submissions the carrier makes further objections that the extent of the claim cannot be determined by either the Board or the carrier. The carrier makes the further point on the merits of the claim that any additional duties which devolve on the agents in connection with the handling of the shipments for the Motor Transport Company involve business which was previously handled by the carrier and later lost to the motor trucks. For that reason the carrier maintains that the present rates were predicated upon the handling of this business. Carrier maintains further that bringing the case under Rule 33 (c) is a subterfuge, inasmuch as all negotiations in respect to the claim have been carried on with the carrier directly. Carrier further maintains that no evidence has been submitted in support of the claim that business has been diverted from the Railway Express Agency, Inc.

In response to the petitioners' contention in respect to separate accounts of the two companies, the carrier submits that the Interstate Commerce Commission made an investigation of the business of the two companies and required the carrier to report the revenue from the Pacific Motor Transport Company as freight business inasmuch as it found that it was a freight carrier.

OPINION OF REFEREE.—From a procedural standpoint under the Amended Railway Labor Act and decisions pursuant to said act, the instant case is on all fours with Award 313, Docket TE–202. Like Docket TE–202, this case involves a debate as to whether the claim is a request to change the agreement or a claim for redress because of misinterpretation and misapplication of the agreement. Following the same line of argument as in Award 313, the Referee holds that the Board must take jurisdiction in order to determine whether the claim is in fact a claim for redress because of misinterpretation and misapplication of the agreement or a request for change in rates of pay, rules, and working conditions. Taking jurisdiction for the same reasons that led the Board to take

jurisdiction in TE–202 does not, of course, carry any implication that decision in the two cases will be the same.

The carrier's statement regarding the loss of business to motor trucks concerns a situation which is a matter of common knowledge. Recovery of that business is of mutual interest to the parties. The carrier appears to have set about doing this in about the only way that was open to it. While the status of California law made it necessary to proceed by indirection, there is no evidence that the carrier, in any clandestine or improper way, circumvented either the law which prohibits a foreign corporation from engaging in intrastate trucking or the Public Utility Law which requires a corporation doing the kind of business in which the Pacific Motor Transport Company engaged to be recorded as an express company. There is nothing to show that the California Railroad Commission was not fully cognizant of the steps the carrier took to meet the competition of motor trucks. So far then, as concerns effort to recover business that had gone to motor trucks, we may assume that the carrier, in the light of California law, employed legitimate means to pursue justifiable and worthy ends which might be expected to benefit both parties to this dispute. We may, therefore, infer that the element of purpose to apply the agreement in a way that would necessarily impair the benefits petitioners enjoy under the agreement is not present in the instant case as it was found to be in Awards 297 (TE–271) and 313 (TE–202).

Assuming in the instant case no element of wilful purpose which was a crucial item in the awards just mentioned, the next question to consider in approaching a decision is whether the end result of the carrier's action, or the form in which that result was obtained, placed upon petitioners burdens not contemplated when the agreement was made of such nature and magnitude as equitably to entitle petitioners to redress, and, if so, whether the agreement, specifically or by reasonable implication, authorizes this Board to grant such redress.

Logical principles may be applied in an effort to answer the above questions but practical application of these principles can only be made to an agreed or an authoritatively determined body of facts. Considering first certain principles deemed applicable, Award 313 (TE–202) contains this language:

> "When a triangular arrangement is entered into by which agents accept a certain basis of compensation for work performed for a railway company in contemplation of receiving in addition commissions at a given rate on express business, he naturally assumes the risks involved in fluctuations from seasonal, cyclical, industrial, climatic, and other natural and impersonal causes over which none of the parties to the three cornered arrangement has control."

To a considerable extent, and within reason, the same logic applies to the amount of work and the nature of responsibilities which an agent has to carry under varying conditions of business. In entering into an agreement of employment an agent assumes the risk of fluctuation in the burden of his duties which flow from normal and impersonal causes except as that risk is limited by the terms of the agreement. The current agreement between the parties to this dispute is full of provisions which safeguard the employee against being imposed upon in respect to the performance of his duties and of course one of the ways in which a limit is placed upon the risk which the employee assumes, if his duties become too burdensome and no remedy is found in the agreement, is the provision that public agencies may be utilized in an effort to change the agreement.

In referring to fluctuation in the burden of duties imposed upon an employee, a line could perhaps be drawn between the burden of duties that results from the normal and customary activity of management in promoting business and the burden that results from special drives and new and exceptional procedures. However, at a time when unemployment was the major hazard which employees faced, legitimate action to obtain more business which would result in more employment must be judged in quite a different light from action which merely diverts business from one category to another with a necessary consequence of loss to employees. But the fact that action is legitimate and in the general interest of both parties to the agreement does not justify the carrier in placing burdens upon any group of employees of a nature or amount not authorized or justified by the agreement. The question whether that has resulted from the action of the carrier which gave rise to this dispute is a question of fact which will have to be established or disproved. The factual

question to answer is, Did the action of the carrier which resulted from its *effort to retrieve business previously lost to motor trucks, or the form that* action took, place burdens upon petitioners of such a nature and magnitude as to give a basis for redress?

The record as it stands does not contain an answer to this question. As the referee views the case, the most sensible way to find an answer would be for the parties to proceed jointly, with all essential records made mutually available, to make a comparative check of conditions of employment for an agreed period prior to installation of the Pacific Motor Transport Service, when business and employment were relatively normal, against normal conditions of employment since the motor transport service was installed. Naturally, in making such a check, it would be essential to make an equitable adjustment of gains and losses accruing to petitioners.

The next question to determine from the standpoint of equity is whether, and to what extent, business has been diverted from the Railway Express Agency, Inc., to the Pacific Motor Transport Company. Here again the record does not give an answer to the question, and here also, the method just outlined for finding an answer appears applicable and sound.

Effort has been made to approach this dispute in the first instance from the standpoint of the equities involved for two reasons, to-wit:

1. *The claim is advanced under Rule 33c. Compared with many other rules* of the agreement, the obligation which Rule 33c imposes on the carrier is relatively indefinite. Under the rule the employee may complain of "unsatisfactory treatment" but the vague phrase "unsatisfactory treatment" is not defined. When complaint is made the carrier is obligated to give "due consideration," but here again an equally vague phrase is not defined. The carrier might set up a claim of having complied with the rule by the most perfunctory hearing of a complaint, or it might be maintained that "due consideration" implied a searching inquiry involving the hearing of evidence followed by a carefully considered equitable adjustment. If parties disagree on what constitutes either "unsatisfactory treatment" or "due consideration," a case to which Rule 33c applies, under proper procedures, may be brought before this Board, where in the last instance, as in the first, equitable consideration would have to be given major weight.

2. The second reason for approaching this case in the first instance from the standpoint of equity is that many of the technical legal and jurisdictional contentions advanced by the parties seemed to require an equitable foundation upon which to base whatever merit they may be found to have.

Much technical argument has been advanced both in support and in opposition to the claim. *Obviously, any disposition of the case must be legal and* must be based on the agreement, but any attempt to decide this case on the ground of technical arguments alone, because of the nature of those arguments and of some of the contradictions they involve, could only lead to confusion. An attempt will be made to restate some of these arguments.

The first technical question is whether the Pacific Motor Transport Company, although *de jure* an express company under the California Public Utility Law, is *de facto* an express company or a freight carrier. Some of its attributes give it the quality of an express company while others give it the quality of a freight carrier. What kind of a company it really is can only be determined in reference to the particular circumstance to which the determination in question applies.

Persuasive argument is advanced to exclude the Pacific Motor Transport Company from the purview of the Amended Railway Labor Act, first, on the ground that it is a trucking concern and, second, that it is engaged solely in intrastate business. As the Referee views this contention, decision of the issue would depend in some measure on whether the Motor Transport Company and the Southern Pacific Company are regarded as making up one transportation unit or as entirely separate and distinct business as well as corporate entities. The Southern Pacific Company handles and transports directly many shipments wholly within the State of California—shipments which do not qualify as interstate commerce. And yet, in the purview of the amended Railway Labor Act, the Southern Pacific Company is engaged in interstate commerce. Employees working under agreements with the Southern Pacific Company whose relations with the Carrier are subject to the amended Railway Labor Act do not switch back and forth from State to Federal jurisdiction and vice versa according to the legal status of the business with which they are occupied

from one moment to another. Does the indirection involved in having this Southern Pacific business performed by the Motor Transport Company give the relationship between the Southern Pacific Company and its employees a new status which excludes that part of its business in which the Motor Transport Company intervenes from the jurisdiction of the amended Railway Labor Act?

As the Referee views the case, the same question would have to be asked and answered in respect to the issue whether the trucking aspect of the Pacific Motor Transport Company's business removes the business from the jurisdiction of the amended Railway Labor Act. If trucking is merely an element in a transaction of the Southern Pacific to which other elements are added to make it complete, it would appear that the whole transaction would need to be examined in order to determine its status.

The Carrier, in support of its contention that this business is freight business instead of express business, has shown that through shipments of commodities handled are made in the same way as when handled by the Southern Pacific Company and, moreover, the Carrier has based a part of its argument on the fact that the Interstate Commerce Commission regards the traffic of the Pacific Motor Transport Company as an integral part of the business of the Southern Pacific Company. Any attempt to decide this issue in the light of all the technical arguments which have been advanced or could be advanced leads into hopeless confusion. Whichever horn of the several technical dilemmas is taken in trying to pass judgment upon the relative merits of technical arguments lands the parties in serious logical contradictions.

It appears impractical to disentangle the technical and equitable elements of this case in advance of a consideration of all the pertinent facts, many of which are not revealed by the record. The Referee is of the opinion that the issues in the case lend themselves more readily to an equitable adjustment than they do to a technical or legalistic adjustment. Therefore, without deciding at this time whether the claim is a request for a change in the agreement or a claim for redress because of a misinterpretation and misapplication of the agreement, the Referee holds that the Board should take jurisdiction to the extent of remanding the case to the parties for conference, for a joint check as above suggested, and for an effort to find a fair and practical adjustment.

AWARD

1. Procedural objections to the Board taking jurisdiction under the Amended Railway Labor Act are overruled without prejudice to other contentions of the parties.

2. Without at this time passing on the question whether the claim is in fact a request for a change in the agreement or a claim for redress because of misinterpretation and misapplication of the agreement, jurisdiction is assumed to the extent of remanding the case to the parties for conference and, if possible, agreement pursuant to the principles and equitable considerations above set forth.

3. In case of disagreement, either of the parties may resubmit the case in such form as a review of the facts and the rules may indicate.

4. Prior to any resubmission of the case, the parties shall make a joint check with all essential information and records made mutually available and submit a joint statement or separate ex parte statements including the following facts:

(A) Definite statement of the nature and extent of the additional duties performed by employees on account of the business done by the Pacific Motor Transport Company over and above the duties which they would have to perform under normal conditions and fluctuations of business as contemplated in the agreement.

(B) As specific a statement as perusal of records made mutually available will permit of the amount of business diverted from the Railway Express Agency, Inc., to the Pacific Motor Transport Company and the loss to employees as result of such diversion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 13th day of October, 1936.