

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

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 Company, Pacific Lines, that Agent-telegrapher R. L. Crowley, Bisbee Junction, Rio Grande Division, be paid express commission on shipment of corpse from Bisbee Junction, April 14th, 1938, to Findlay, Ohio, in the amount of \$11.22."

EMPLOYES' STATEMENT OF FACTS: "Bisbee Junction is a freight, ticket and joint express office located on the Rio Grande Division.

"On April 14th, 1938, Undertaker Allison of Bisbee, Arizona, transported in his own vehicle a corpse to Bisbee Junction, arriving at 1:20 P. M. The corpse was for shipment via express to Findlay, Ohio, and was to be forwarded on train No. 4. At 1:50 P. M., the driver for the Express Company at Bisbee arrived at Bisbee Junction with Bisbee waybill 5513 reading Bisbee, Ariz., to Findlay, Ohio, and attached this waybill to the box containing the corpse. The charges on this shipment of express was \$112.16.

"An agreement exists between the parties to this dispute effective as to rules and working conditions, September 1st, 1927, and as to rates of pay, May 1st, 1927, revised July 1st, 1930, and August 1st, 1937."

POSITION OF EMPLOYES: "EXHIBITS 'A' to 'N' inclusive are attached to and made a part of this brief.

"This claim is filed and prosecuted under the Rule 33 (c) of the effective Agreement, which we quote:

"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."

"This claim is supported by precedent already established by a situation arising under analogous circumstances in 1935. On November 21st, 1935, the express driver at Bisbee billed one dog in a crate under Bisbee waybill 4437 to Morris Plains, N. J., charges \$12.54. The dog was brought to the Bisbee Junction station by the shipper. Claim was filed by Agent Crowley for the commission of \$1.25 and after being handled by the Committee, was paid as evidenced by the following letter:

1. Shipper brought a live dog from an intermediate point between Bisbee and Bisbee Junction to Bisbee Junction from which station it actually originated and was shipped.

2. Waybill covering that shipment had been skeletonized at Bisbee, the billing being completed at Bisbee Junction by Railway Express Agency truck driver after he placed the dog in the crate and had weighed the shipment at Bisbee Junction.

3. Actual custody of the shipment, the dog, was taken by the Railway Express Agency at Bisbee Junction.

"In view of the unusual circumstances and handling involved in the dog shipment the particular claim was allowed, however the allowance of this claim did not establish a precedent, and would have no bearing on the alleged claim even though the circumstances were the same. The settlement of that claim was of the type referred to by the Board in their Award 274, wherein it stated in part—

'Cases are likely to arise under Labor Agreements which can only be handled on their individual merits and when so handled should not be regarded as creating precedents for subsequent cases or as changing the Agreement in question. The Referee finds that the case before the Board is a case of this sort. In the absence of a specific rule an equitable compromise adjustment is in order.'

CONCLUSION

"In the absence of any rule in the Agreement, which would sustain the alleged claim which is entirely without merit, the Carrier requests that the claim of the Petitioner be denied."

OPINION OF BOARD: Agent-telegrapher, R. L. Crowley, claims commission of \$11.22 on the express shipment of a corpse on April 14, 1938, from Bisbee Junction, Arizona to Findlay, Ohio, the rate of \$112.60 on an unaccompanied corpse being twice the regular one way first class fare. He contends that the shipment originated at Bisbee Junction.

The carrier contends that the shipment originated at Bisbee which is eight miles distant and that it was delivered by the undertaker in his hearse at the Junction rather than being sent from Bisbee in an express truck out of deference to the family of the deceased.

The undisputed facts are fully set forth in the statements of the parties.

If the shipment originated at Bisbee Junction the claim should be allowed. If it originated at Bisbee the claim should be denied.

The employees argue that a previous allowance to this same claimant of commission on the shipment of a dog furnishes precedence for the allowance of the instant claim. However, the previous claim was adjusted on the property and as was said in Award 274: "Cases are likely to arise under Labor Agreements which can only be handled on their individual merits and when so handled should not be regarded as creating precedents for subsequent cases or as changing the agreement in question."

In the absence of any controlling awards of the Board we turn to accepted legal reasoning.

A test that may throw light on the problem presented is to determine when the express company's liability began. For that purpose we paraphrase the language of 4 Ruling Case Law, Page 688, Carrier's Paragraph 167, as follows:

The point of time marking the commencement of liability was that moment when the undertaker surrendered the entire custody of the corpse

and the express company received complete control of it for the purpose of shipment at the earliest practicable opportunity in the usual course of business.

That moment was when the shipment was accepted by the agent-telegrapher at the station platform at Bisbee Junction. It was his duty as representing the express company to see that the shipment was in proper condition. It cannot be said that the corpse came under the control of the express company until it had been accepted by its representative.

Was there constructive delivery at Bisbee by custom of the parties? The burden of proving custom is on the party asserting it. In this instance neither custom nor usage was claimed or proved.

Ruling Case Law states, in Volume 4, Page 695, Carrier's paragraph 174, in effect that a bill of lading or other receipt is not ordinarily essential to a complete delivery and we reason from this that a waybill is merely prima facie evidence of delivery to the carrier. Complete control by it is essential to liability. Since liability could not attach until after unconditional surrender of the corpse by the undertaker and the acceptance of it by the express company we are constrained to hold that the shipment originated at Bisbee Junction notwithstanding the issuance of the waybill at Bisbee and the revenue accounting at that point based on a tariff with Bisbee as the originating station.

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 employe involved in this dispute are respectively carrier and employe 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 agent-telegrapher at Bisbee Junction, R. L. Crowley, is entitled to the express commission claimed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 31st day of July, 1941.