

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, 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 Southern Pacific Company, Pacific Lines, that E. M. Godwin, Agent, Wells, Nevada, Salt Lake Division, be compensated at the rate of \$25.00 per month, August 1, 1941, through July 31, 1944, account being required to handle express transfer, hiring and supervising the employes performing this work and being responsible for this service, said duties being separate and apart from his duties as Joint Agent for the Southern Pacific Company and the Railway Express Agency, Inc.

EMPLOYEES' STATEMENT OF FACTS: On August 1st, 1941, the Railway Express Agency moved the express transfer from Cobre, Nevada to Wells, Nevada. E. M. Godwin, joint agent for the Southern Pacific Company and the Railway Express Agency, at Wells, Nevada, was required to assume the transfer duties formerly handled by the agent at Cobre, with no salary being allowed for this additional work. During the time the express transfer was handled by the Southern Pacific agent at Cobre, the Railway Express Agency paid this joint agent for handling the transfer business. From the time the express transfer was forced upon Claimant Godwin at Wells, he continued to make verbal requests and discussed the question of a transfer salary with various Route Agents and Superintendents of the Railway Express Agency, receiving verbal promises that the matter would be adjusted, finally resulting in the filing of a formal request on May 3rd 1944.

The express transfer at Wells consisted of handling, taking care of and transferring express from trains Nos. 87 and 88 consigned to points in both direction from Wells, shipments being carried by their destination due to stations being closed at night, and then taken up at Wells and delivered by train arriving when delivery could be made at destination; transferring express shipments from Railway Express Agency truck operating between Wells, and Ely, Nevada, these shipments being received or forwarded by train from Wells; also transferring express routed via the Union Pacific Railroad going to points on that property or consigned from points on the Union Pacific Railroad to other destinations via Wells and the Southern Pacific Company trains or Railway Express Agency trucks, all of this business being transferred at Wells.

This express transfer consisted of all kinds of merchandise and in addition, many shipments of valuables for which agent was responsible and which he had to receipt for or obtain receipt from the party to whom transferred.

The business became so heavy, it was necessary for the Railway Express Agency to authorize the hiring of employes to perform this transfer work. All of these employes were hired by, personal records completed, and official

"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."

When the claimant, through the general chairman, complained to the carrier of alleged unsatisfactory treatment at the hands of the Express Agency, the carrier conducted a complete investigation as to said alleged unsatisfactory treatment, and said investigation produced conclusive evidence that there was no basis for the claimant's claim that he was entitled to a monthly allowance of \$25.00 per month retroactive to August 1, 1941, and likewise produced the conclusion that when the Express Agency offered to apply the allowance of \$25.00 per month effective June 1, 1944, such action on its part constituted a proper disposition of the matter and the claimant in refusing to accept said offer had no basis for a contention of unsatisfactory treatment at the hands of the Express Agency.

CONCLUSION: The carrier asserts that it has conclusively established that there is no basis for the claim in this docket and therefore submits that it should be denied.

OPINION OF BOARD: Claimant was the Joint Agent of the Carrier and the Railway Express Agency at Wells, Nevada, during the period involved in this claim. On August 1, 1941, the Railway Express Agency moved its express transfer from Cobre, Nevada, to Wells. It is the contention of Claimant that the supervision thereof and the responsibility therefore was wholly made a part of his work without provision being made for additional compensation. The claim is for \$25.00 per month additional compensation from August 1, 1941 to August 1, 1944, the date that Carrier agreed to pay Claimant \$25.00 per month for this additional service.

The claim is founded on the provisions of Rule 33(c) of the current Agreement which provides:

"Telegraphers required to serve express or commercial 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."

The record reveals that Claimant was performing additional service for the Railway Express Company at Wells after the express transfer work was moved to that point. The record further shows that Claimant made numerous requests for an adjustment in pay to the route agents of the Railway Express Agency without success. On September 13, 1944, claim was filed with the Carrier for the first time. The Carrier denies that the work was performed by Claimant as stated and alleges further that a settlement was agreed to between the Railway Express Agency and Claimant whereby additional compensation of \$25.00 per month was to be allowed retroactive to June 1, 1944, and to continue as long as the express transfer work existed at Wells.

The history of this settlement is briefly stated as follows: On May 3, 1944, Claimant wrote the Superintendent of the Railway Express Agency stating the nature of the work performed and asking that he be allowed \$25.00 per month additional compensation retroactive to August 1, 1941. This letter also informed the Superintendent that unless some agreement was made along these lines, he would place the matter in the hands of his Organization for handling. Shortly afterwards the claim was placed with the Organization for handling. Thereafter an adjustment of differences was had. Claimant describes the settlement in a letter to his General Chairman under date of June 24, 1944, in the following language:

"It is agreed that the Express Company pay me \$25.00 per month for this service in addition to my regular commissions retroactive to June 1st, 1944, and thereafter as long as the same conditions exist here at Wells."

It appears that Claimant submitted a bill to the Railway Express Agency for the June and July, 1944, payments as agreed upon. Through some misunderstanding these claims were rejected. Claimant then became adamant and demanded the amounts set forth in his original claim. There is some evidence in the record that the Express Company had difficulty in obtaining the approval of the War Labor Board for the \$25.00 per month increase in salary. It was not until November 10, 1944, that Claimant was advised that this approval was obtained. When requested to submit claims for August, September and October, 1944, Claimant submitted them from August 1, 1941. Claims for all months subsequent to August 1, 1944, have been paid. It is evident that the settlement was not completed as made because of a misunderstanding as to the retroactive date that it was to become effective, slowness in obtaining approval of the War Labor Board and considerable procrastinating on the part of the Railway Express Agency officials.

The fact remains, however, that Claimant in attempting to disavow the settlement made, did not effectively do so. In order to avoid a settlement because of a breach on the part of the other party, one must disavow the whole transaction and return to the status existing before the breach. Claimant accepted and continued to accept the \$25.00 per month pay that he obtained by the settlement and disavows only the part fixing the retroactive date that it was to become effective. This, he cannot do. He must accept the settlement in full or reject the whole of it when a breach occurs. It is fundamental that he cannot accept the part which is more favorable to him and reject that which is less favorable when a violation occurs. Claimant must therefore accept the retroactive date of June 1, 1944, as he agreed to do in the settlement made between the parties.

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

That the parties waived oral hearing thereon;

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated as charged.

AWARD

Claim sustained from June 1, 1944.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 25th day of April, 1947.