Award Number 297
Docket Number TE-271

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers on Kansas City Southern Railway that the established normal commission rate of 3%, with a maximum of $10.00 per car, on carload express shipments paid the railroad station agents by the Railway Express Agency, Inc., which rate was arbitrarily reduced to a maximum of $5.00 per car as of May 4, 1933, with the approval of the railway company but without notice to or conference or agreement with the representative committee of employees, shall be restored and all agents adversely affected thereby be retroactively reimbursed for the monetary loss sustained through the arbitrary reduction."

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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

As result of a deadlock, Willard E. Hotchkiss was appointed as Referee to sit with the Division as a member thereof.

An agreement bearing date of September 1, 1927, is in effect between the parties.

POSITION OF PETITIONER.—Petitioners submit that the 3% commission, with a maximum of $10 per car on all carload express shipments, was considered by the parties in arriving at an acceptable rate of pay. They contend that the express commission rates cannot legally be changed without notice and conference, and that the act of the carrier in agreeing with the express agency to reduce the rates without such notice and conference, constitutes a violation of the agreement. They refer particularly in this connection to the termination clause which makes the agreement effective as of September 1, 1927, and continues it in effect until terminated by thirty days' written advance notice by either party.

The petitioner maintains that the employees involved in this case, although nominally employees of the Railway Express Agency, Inc., are, as concerns railway express business, actually the employees of the carrier, that commissions paid for express business are part of their basic compensation. They maintain further that the carrier either took the initiative in reducing commissions or concurred with the express agency in so doing.

POSITION OF THE CARRIER.—The carrier makes the following contentions:

"1. That the National Railroad Adjustment Board is without jurisdiction;

"2. That the carrier has no contractual obligation to maintain amounts or rates of commissions paid by the Railway Express Agency to the carrier's employees;

"3. That only two rules of the telegraphers' schedule refer to express commissions, and the carrier has not been charged with a violation thereof;

"4. That no change has been made in the schedule rate of pay of any employee coming under the telegraphers' schedule;

"5. That the claim is, in effect, a demand for an increase in the rates of pay covered by the telegraphers' schedule or a new rule requiring the carrier to pay express commissions, although proper notices thereof have not been served upon the carrier."

OPINION OF THE REFEREE.—It is not necessary to review the contents of the extensive record in which the correspondence between the parties and their positions is developed at length. Strong arguments which carry a high degree of persuasiveness are advanced on both sides, but technical legal arguments do not go to the root of this issue.

The practice by which railway agents are paid commissions for services performed for companies other than their principal employer, the particular railroad company, is sufficiently general to be regarded as part and parcel of the system under which industrial relations on American Railways are conducted.

The recipient of commissions under such a system is in an entirely different status, both as regards his primary employer, the railway company, and as regards his secondary employer, in this case the Railway Express Agency, Inc., from a person who has occasional or fortuitous opportunity to increase his regular wages by supplementary earnings.

A triangle in human relationships involves difficulties and usually gives rise to considerable argument. Cases now before the National Railroad Adjustment Board indicate that this one is no exception to the rule. It will probably be better in the long run for all three of the parties concerned with the question of express commission on any given railway to have their respective rights and responsibilities clarified, than it will to be continually involved in needless disputes. It must be remembered that commissions figure in negotiating agreements as well as in interpreting them, and it is easy to picture representatives of employees minimizing their importance and magnifying their precariousness while a given railway is magnifying their significance as a dependable source of income.

In the instant case, the railway company and the Railway Express Agency, Inc., jointly have undertaken to revise commissions in a manner which constitutes in essence denial on the part of both the railway and the Express Agency of contractual obligation to the agents concerned, for the maintenance of the rate of commissions which obtained before the revisions were made. Both the Railway Company and the Railway Express Agency, Inc., are covered by the Amended Railway Labor Act. If, therefore, the established rate of commission should be interpreted as a contractual obligation any change in the rate would have to be made in conformity with the provisions of Section 6 of the Act.

Assuming a contractual obligation, and assuming, as in the instant case, ex parte action without proceeding under Section 6 of the Amended Railway Labor Act, the question then arises as to whether in seeking redress the Railway or the Express Agency, or both of them together, should be hailed into Court.

In deciding this case then, two questions must be answered: First, did the established rate of commissions constitute a contractual obligation subject to the provisions of Section 6 of the Amended Railway Labor Act? Second, if payment of the established rate of commission was a contractual obligation, was it the responsibility of the Railway Company or of the Express Agency, or were they jointly and severally responsible?

As to the first question, there is ample precedent to establish the obligation either to continue paying commissions when such commissions were in force at the the time wage schedules were adopted, or to adjust wage schedules when payment of commissions ceases. However, in response to citation of cases which have enforced this obligation, argument is advanced that no such obligation exists when merely the amount of commissions is altered. In support of this position, it is argued that express commissions vary widely from month to month, season to season, and from year to year and that such variations greatly affect the total compensation of the railway employees involved. In further support of this view, it is pointed out that the "wage fabric" of these employees is subject to change, and when such changes occur either one of the parties

desiring the change in wage rates must serve notice of this desire and call for conference.

The Referee is of the opinion that normal fluctuations in commissions, due to factors other than the willful acts of either the railway or the Express Agency, must stand in quite a different light from fluctuations occasioned by a definite change in the basis upon which express commissions are figured. It would appear to be a highly technical argument that abolition of commissions which is the equivalent of a reduction of 100 percent would require a revision of the wage rates; whereas, a reduction of ninety percent, seventy-five percent, fifty percent, or any other material amount would not require such revision.

The Referee finds that under the agreement in which Express commissions were considered in establishing the wage scale a mutual obligation exists to maintain the rate of commissions intact, or to adjust the wage scale to compensate for change in the rate of commissions until such time as wage rates or commissions or both are changed in accordance with Section 6 of the Amended Railway Labor Act.

The record of the instant case indicates that both the railway company and the Express Agency participated in the change in the rate of commission which gave rise to this complaint. This fact makes it pertinent to consider the second question propounded above, as to the respective obligations of the Railway Company and the Railway Express Agency, Inc.

The Referee is of the opinion that the relationship between express commissions on the one hand and the rates which agents are paid by the railways on the other goes considerably deeper than merely confirming an obligation either to maintain rates of wages and commissions intact or to make adjustments in the way legally prescribed.

As long as a railway company or the Railway Express Agency, Inc., is in a position to shift responsibilities back and forth, the purposes of the Amended Railway Labor Act in respect to this three-cornered relationship are bound to be impeded. These purposes, as stated in Section Two (2), are as follows:

> "SECTION 2. The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

In the same section, the purposes of the Act are further amplified in the first paragraph under "General Duties." This paragraph reads as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The railways of the country and the Railway Express Agency, Inc., are both covered by this law. There can be no doubt that Congress intended that employer-employee relationships involving express business, as well as relationships involving railway business direct, should be amicably, efficiently, and promptly adjusted under the provisions of the law.

Argument has been advanced in this case to the effect that in respect to express business, agents are not the employees of the railway in a way to make the railway contractually liable for their commissions. In another case now before this Division, argument involving elaborate definition of the abstract legal requirements, requisite to establish the employer-employee relationship, was advanced to establish in law, the fact that agents are in no sense employees of the Railway Express Agency, Inc. The Referee has also carefully noted

the rulings cited in that case (TE–247) which as a matter of legal definition seem to uphold that view

Courts are frequently called upon to resolve legal impasses of this kind and the high authority of the Supreme Court of the United States may be invoked for applying the rule of reason to them. Taking a reasonable and realistic view of the three-cornered relationships between agents, the railway on which they work and the Railway Express Agency, Inc., the Referee cannot fail to be impressed with the close connection between the Railways of the United States and the Railway Express Agency, Inc. Although the Express Agency is a separate corporation, it is owned and controlled by the carriers over whose lines express business is carried. There are a number of specific facts which need not be cited in detail to show how the relationships between the carriers and the Railway Express Agency are interwoven. Ambiguity concerning the status of employees who serve both the railways and the Railway Express Agency, Inc., and whose total compensation is made up of regular wages, hourly, daily, or monthly, as the case may be, paid by the railway and of commissions paid by the Railway Express Agency, must inevitably make for confusion and discord instead of the prompt and orderly settlement of disputes which it is the purpose of the Amended Railway Labor Act to promote.

For the purposes of this Act, it appears clear that agents are primarily employees of the particular railway on which they work, and, secondarily, employees of the Railway Express Agency, Inc., whom they serve. Legal definitions aside, they serve year in and year out as agents of the Express Agency, and it is not vital to the issues involved whether they are called employees, functionaries, agents, or what not.

The salient fact is that express commissions are inextricably interwoven with the wages which the Railway contracts to pay agents. 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. With them so interwoven, such a realistic approach becomes inescapable.

The most effective way in which the railways and the Railway Express Agency, Inc., can discharge the duties imposed by agreements and by the Amended Railway Labor Act is to meet squarely the general question how matters involving express commissions supplemental to wages paid for service to the railway shall be handled. That is the responsible way to proceed and in the judgment of the Referee it will prove in the long run more satisfactory for all concerned, than to be confronted by the inevitable disputes sure to result from shifting responsibility back and forth.

Although as above noted, the Referee is aware that the Railway Express Agency, Inc., disclaims the status of employer to agents, working for the Agency on commission, and although he is not advised of the existence of any formal agreement between the Railway Express Agency and the Agents employed by the Carrier involved in the instant case, he still holds that within the purview of the Amended Railway Labor Act agents are secondarily employees of the Railway Express Agency, Inc. As to the existence of agreements, the Referee holds that the force of established practice, taken together with the fact that the rate of commissions on express business is a vital factor in determining the rate structure in respect to service performed for the railway, makes the responsibility to pay commissions at the rate contemplated when the wage rates on the railway were agreed to tantamount, in the purview of the Amended Railway Labor Act, to a triangular agreement between the three parties involved and subject to termination only in conformity with the provisions of the Act.

In holding that the railway concerned and the Railway Express Agency, Inc., are jointly and severally liable under agreements in which express commissions constitute a factor in the wage structure of agents, the Referee is aware that the question remains open whether to make the Railway or the Railway Express Agency, or the two together, respondents in cases involving

express commissions. The answer to that question would naturally depend upon the language of the particular agreement and the circumstances surrounding the case. In the instant case, the railway and the Railway Express Agency, Inc., were participants in the change in commissions of which complaint is made. The Referee is of the opinion that petitioners would have been within their rights under the agreement and the Amended Railway Labor Act to have hailed them jointly before the Board. They were equally within their rights in making the Railway the respondent. In either case, the claim would stand or fall on its merits.

AWARD

(a) The carrier respondent in this case shall either cause the Railway Express Agency, Inc., to restore the rate of commissions as of the date when the rate was changed or compensate the claimants for the monetary loss sustained because of the change of rate.

(b) If the carrier and the Railway Express Agency, Inc., elect to leave the changed rate of commission in force, the carrier shall continue to make good the loss to claimants occasioned by the change in the rate of commissions, pending notice and negotiation, in conformity with Section 6 of the Amended Railway Labor Act.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 17th day of September 1936.