Award Number 298
Docket Number TE–247

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

RAILWAY EXPRESS AGENCY, INCORPORATED

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers on Seaboard Air Line Railway that:

"(1) The commission rate on carload express shipments accruing to the joint railway-express agent at Lawtey, Fla., as established by Article 2 of the Express Agreement of August 1, 1917, and at all other joint agencies on Seaboard Air Line handling carload express shipments, shall be restored as of the date the rate was arbitrarily reduced.

"(2) That the minimum amount of commission of ten dollars ($10.00) per month, as established and guaranteed by Article 2 of the Express Agreement of August 1, 1917, shall be restored to the joint railway-express agency at Rutherford, Ala., and at all other joint railway-express agencies where the minimum rate has been arbitrarily reduced or reduced through individual agreement between the express company and agent; and that these agents be retroactively reimbursed in the amount of the difference that should have been paid under the express agreement.

"(3) That all transfer allowances established by Article 3 of the Express Agreement of August 1, 1917, and higher rates in effect which have been arbitrarily changed, or changed by individual agreement, as at Moncure, N. C., shall be restored retroactively to the date such changes were made in violation of the Express Agreement, and all agents affected be paid the difference due them under the Express Agreement."

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 employee within the meaning of the Railway Labor Act as approved June 21, 1934.

The case comes before this division of the Adjustment Board exclusively on the question of the Board's jurisdiction.

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 Board as a member thereof.

On request, there has been a rehearing of the case with the Referee sitting as a member of the division.

A long and carefully prepared record is before the Board, extensive briefs have been filed, and the case has been ably argued.

BACKGROUND OF DISPUTE.—Effective July 1, 1909, a signed agreement was executed between the Southern Express Company and the Southern Express Agents, who are jointly employed as railway and express agents on the Seaboard Air Line Railway, governing rules, rates of commission, and transfer allowance for agents in the employ of the Seaboard Air Line Railway, required by the Railway to also serve the Express Company as agent, or perform transfer service at railroad stations. This agreement was revised as of June 1, 1912, and again as of August 1, 1917, and was in full force and effect when the United States Railroad Administration assumed control and operation of transportation by railroad.

Article 11 of this Agreement provided:

"No change will be made in the foregoing articles until after notice of thirty (30) days in writing has been given."

On June 2, 1918, the United States Government, through the Director General of Railroads, negotiated a Memorandum of Agreement with the four principal express companies operating at that time, including the Southern Express Company through the medium of a newly organized joint operating company titled the "American Railway Express Company", which company under the terms of the Memorandum of Agreement was the sole agent of the Government under the supervision of the Director General of Railroads to conduct the express transportation business upon all lines of railroad under Federal control. The American Railway Express Company, a joint operating company for the Adams, American, Wells-Fargo, and Southern Express Companies, was maintained after the termination of Federal control, and on September 1, 1920, at the end of the Guarantee Clause (Sec. 209) of the Transportation Act, 1920, a "Uniform Contract for Express Operations over Rail Lines" was prepared and executed between the American Railway Express Company and Rail Companies in the United States, including the Seaboard Air Line Railway, whereby the Express Company was granted the exclusive right and privilege to control, conduct, and transact all of the express transportation business over its lines.

As of March 1, 1929, the Rail Companies in the United States united in acquiring the American Railway Express Company through their own express agency, thereafter known as the Railway Express Agency, Inc., and have since conducted the operations of the express business through such express agency, and on the Seaboard Air Line Railway in particular.

The record shows that the terms of the contract, effective July 1, 1917, remained in effect until April 1, 1930, when the Railway Express Agency, Inc., placed in effect a flat rate of five dollars ($5.00) per car on carload shipments and, following that, made individual agreements with certain of the joint agents to handle express business on a straight commission basis and to reduce the transfer allowance below that specified in the agreement.

PETITIONERS' POSITION.—The petitioners submit that an agreement was entered into by the Southern Express Company in August, 1917, with a Committee of the Order of Railroad Telegraphers in behalf of the joint railway express agents, that its obligations passed to the successor companies—first, the American Railway Express Company, then the Railway Express Agency, Inc., that these obligations continued to be assumed until April 1, 1930, when in violation of the agreement the Railway Express Agency, Inc., took the action upon which this claim is based.

The petitioners further contend that the agents are employees of the Railway Express Agency, Inc., within the purview of the Amended Railway Labor Act and that even if the agreement, effective August 1, 1917, should be held not to bind the Railway Express Agency, Inc., the Board should nevertheless take jurisdiction and decide the case on its merits as constituting a grievance to be adjusted under the terms of the law.

In support of their contentions, the petitioners argue substantially as follows:

They submit, as Exhibit "D", copies of letters during 1925 between the superintendent of the American Railway Express Company and the General Chairman of the organization which relate to changes in rates of commissions; also, as Exhibit "E", a letter of April 8, 1930, from the superintendent of the Railway Express Agency, Inc., again relating to change in rate of commissions; as Exhibit "F", a letter of December 17, 1931, from the Alabama Public Service Commission relating to a petition for closing of an agency the hearing upon which involved consideration of the changes in rates of commissions, particularly as relating to the minimum for express agents; as Exhibit "G", a letter of January 23, 1935, from the superintendent of the Railway Express Agency, Inc., changing the rate of commission paid individual agents; as Exhibit "H", another letter from the same officer dated June 5, 1935, relating to change in respect to guarantee; as Exhibit "I", an exchange of letters in 1925, between the Vice President of the S. A. L. Railway Company, the General Chairman for the employees, and the General Manager of the American Railway Express Company.

The petitioners urge that the contract between the joint agents and the Southern Express Company was taken over by the American Railway Express as one of the liabilities of the Southern Express Company, and they cite a number of de-

cisions of varous courts as holding that it was not necessary that such contract be actually assigned in order to make the American Railway Express Company answerable for the liability of the Southern Express Company.

Reliance is placed by petitioners upon the definition of joint employees by the Interstate Commerce Commission in certain rules to identify them as Express Company employees.

Petitioners submit also that the filing of application for bond is evidence of the employees' relation to the Express Company.

The testimony of Dr. Charles P. Neill, representative of the Southeastern Carriers in a hearing before the U. S. R. R. Labor Board in Docket 4624 which indicated the right of the Express Company to employ and dismiss the railway agents from Express Company service was cited as establishing the employer and employee relation.

Petitioners also rely upon the recent act of Congress levying income tax upon employees of carrier as defining these railway station agents also employed as express agents as being also employees of the Express Agency.

RESPONDENT'S POSITION.—The position of the Railway Express Agency is that the complainant parties are not employees of the Express Agency and that the agreement between the joint agents and the Southern Express Company is not an agreement to which the Order of Railroad Telegraphers is a party as they contend, is evident on the face of the contract which was executed for the joint agents by one D. May. Although he was General Chairman for the O. R. T. as the plaintiff alleges, he signed this contract "For the Joint Agents" and the contract must stand as signed, not as a contract with the O. R. T. The O. R. T. not being a party to that contract, therefore, may not maintain a proceeding before this Board based upon such contract.

The American Railway Express Company, upon the execution of an agreement with the Director General of Railroads, July 1, 1918, did not adopt the agreement between the joint agents and the Southern Express Company; the latter continued to be and still is a corporation. The agreement between the Government and the American Railway Express Company specified that payment of agents' commissions would be to the Director General. A subsequent understanding did, they admit, in fact provide for payment of these commissions directly to the agents, but this they say was by specific agreement with the Director General and not in accordance with any agreement between the railway agents and the express company. The commissions were at the same rate as those of the Southern Express Company. Those commissions were determined by the contract with the Director General and, though the same as those previously paid by the Southern Express Company, were not dependent upon any contract or understanding between the American Railway Express Company and the joint railroad agents or the O. R. T.

The agreement with the Director General had a term providing that the express companies which formed the American Railway Express Company would turn over to the new corporation all contracts. However, no assignment of the Southern Express contract was ever made under the term of the new contract with the Director General. That contract never was accepted by the American Railway Express Company, and no contract was ever made between the joint agents and the American Railway Express Company and no such contract has ever been executed by the Railway Express Agency, Inc.

The respondent cited a decision of the Supreme Court of North Carolina in answer to petitioners' argument that actual assignment of contract was not necessary in order to bind the successor company (Railway Express Agency, Inc.) and held that citations by complainants were cases involving fraud. Several other citations were made and emphasized as supporting respondent's position that the August 1917 contract is not in force.

In further support of their position, it was pointed out that beginning September 1, 1920, the American Railway Express Company began the conduct of business under a contract known as "Uniform Contract for Express Operations over Rail Lines", which continued in effect until March 1, 1923, when the "Amended Uniform Contract for Express Operations over Rail Lines" became effective. These two contracts contained among other things provisions for the railway company's employees to act as agents of the Express Company, etc. On February 28, 1929, the American Railway Express Company ceased to conduct business and all contracts in existence were assigned by that company by specific agreement between the parties concerned. In particular reference to labor agreements, all three parties, the American Railway

Express Company who relinquished, the Railway Express Agency, Inc., who accepted, and the labor organization involved, joined.

Respondent submits that it has never included commission agents among its employees in reports to Interstate Commerce Commission, also, that the filing of a bond does not constitute an employer-employee relationship. Respondent also takes issue which conclusion drawn from testimony of Charles P. Neil above cited and denies that it dismissed or employed express agents. Respondent says it is definitely and clearly established that they may be dismissed only by their railway employers. Express Agency, they say, has no authority to hire or promote or discipline such agents. They perform service for the Express Agency incident to their duty resulting from their railway employment and not because of an employment relation to the Express Agency. In oral argument it was maintained that even in case of peculation, the Express Agency would be powerless to do more than take its business away from an agent unless the railway were willing to dismiss him.

Respondent also makes the point that the Express Agency does not regard these agents as employees in respect to requirements of the Income Tax Law. Also, that these joint agents are not subject to rules governing hours and working conditions of employees of the Express Agency. These rules specify that they shall not apply to individuals performing special service requiring only a part of their time from other employment or to those paid on a commission basis.

Respondent's contention that joint agents are not employees, that the agreement of August 1917 is not in force, and that the O. R. T. is not in a position to maintain a proceeding before this Board based upon the August 1917 contract with the joint agents is relied on to exclude this case from the jurisdiction of the Board under the Amended Railway Labor Act.

The Attorney for Respondent at oral hearing before this Division with the Referee was emphatic in the position that a grievance under the Amended Railway Labor Act must arise out of an agreement; if there is no agreement, according to his view, there can be no grievance. In emphasizing further the lack of responsibility on the part of the Railway Express Agency, Inc., arising out of the contention that the joint agents are not employees of the Express Agency, Attorney for Respondent cited the circumstance in which the Express Agency might arrange with a drayman to look after express business. It is obvious, he maintained, that in those circumstances the drayman would not in any sense be covered by the Amended Railway Labor Act in respect to his relations with the Railway Express Agency, Inc.

The respondent advanced further argument against covering this case in under the terms of the Amended Railway Labor Act to the effect that the contract which petitioners allege was violated antedates the Transportation Act.

OPINION OF REFEREE.—The Referee is not disposed to enter into any minute analysis of the somewhat elaborate legal arguments advanced by the parties to this dispute. For the most part he believes that they are not crucial to the basic issues involved in the case.

Irrespective of the present validity of the contract between the joint agents and the Southern Express Company, effective August 1, 1917, and irrespective of the status of Mr. May as a signatory of that contract, the fact remains that 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.

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 responsibilities 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.

Since the Agreement of August 1917 was supposedly in force prior to April 1, 1930, we are warranted in assuming that commissions figured in negotiating the wage agreement with agents on this Railway, and this fact cannot be ignored in dealing with cases in which commissions are involved.

The Referee finds, therefore, in this, as in any other case in which express commissions were considered in establishing the wage scale for agents on any railway, an obligation exists either to maintain the rate of commissions intact or adjust the wage scale to compensate for changes in the rate of commissions until such time as the wage rates or the commissions, or both, are changed in accordance with Section 6 of the Amended Railway Labor Act.

But the relationship between express commissions on the one hand and the rate which agents are paid by the railway on the other goes even deeper than this. 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. These purposes as stated in Section 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 was advanced in a case which is being decided concurrently with the instant case and from which part of the language of this decision is borrowed, Award 297 (TE–271) to the effect that the agents involved in that case were not employees of the Railway in respect to express business in such a way as to make the railway contractually liable for their commissions. In this case argument involving elaborate definition of the abstract legal requirements requisite to establish the employer-employee relationship is advanced for the purpose of establishing in law, the fact that agents are in no sense employees of the Railway Express Agency, Inc.

The Referee has noted carefully the citations in the these two cases, by which disclaimer of responsibility for commissions is supported. He is prepared to admit as a matter of abstract legal definition that the citations do in fact appear to support the argument advanced. However, as applied to the instant case, it is not possible to uphold disclaimer of respondent for obligation to maintain the rate of commissions, in the light of an instrument which, over a long period of years, was mutually regarded as an agreement by the joint agents and the Southern Express Company and its successors, and which specified definitely how it could be terminated. The instrument has all the carmarks of being an agreement in respect to an employer-employee relationship. Without challenging any of the legal citations advanced, there would appear to be grave doubt whether a relationship which has continued over a long

period of years under an instrument which to all intents and purposes is an employer-employee agreement and, which contains specific stipulation for its termination, can suddenly be arbitrarily relieved of the attributes of an employer-employee relationship by ex parte action.

If, as in several other cases which have come before the Board, the parties had entered into some temporary arrangement, there are many circumstances which would permit ex parte denouncement of such an arrangement. Such action in at least one case has been upheld by this Referee Award 272 (CL–276). In the instant case, however, there can be no serious question that the instrument of August 1917, operated with all the force and effect of a regular agreement from its inception, until April 1, 1930, when it was terminated, if at all, by the ex parte action of the Railway Express Agency, Inc.

The fact that the ex parte action of the Railway Express Agency, Inc., antedated by more than three years the passage of the Amended Railway Labor Act might, as respondent maintains, weaken the arguments of petitioners that this Board should assume jurisdiction if the Agreement of April 1917 and the Act of 1934 were the only instruments and the only legislation by which the triangular relationship between joint agents, the railway involved in the particular case, and the Railway Express Agency, Inc., were covered. That, however, is not the situation. Triangular arrangements like the one here under consideration have been for many years standard practice on American Railways and the legislation of 1934 is amendatory of previous legislation which, under different forms and provisions, had to a considerable extent the same purpose in respect to industrial relations as the Amended Railway Labor Act of 1934. This was notably true of the Act of 1926.

In considering the essence of these triangular relationships, the Referee cannot fail to note 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. 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, Inc., must inevitably make for confusion and discord instead of the prompt and orderly settlement of disputes which it was the purpose of the Amended Railway Labor Act, and substantially of earlier legislation, to promote.

For the purposes of the Amended Railway Labor Act which covers the Railway Express Agency, Inc., as well as the railways, 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 the Railway Express Agency, Inc., year in and year out as agents and it is not vital to the issues involved whether we call them agents or employees or functionaries or any other title which we may use to describe their positions.

The salient fact is that express commissions are inextricably interwoven with the wages which railways contract 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.

In the case referred to above, Award 297 (TE-271), decision on which is being rendered concurrently with decision in the instant case, the Referee was not advised of the existence of any formal agreement between the Railway Express Agency and the Agents primarily employed by the carrier involved in that case. The Referee held, however, that the force of established practice in respect to express commissions, taken together with the fact that the rate of commissions on express business was a vital factor in determining the rate structure in respect to the service performed for the Railway, made the responsibility to pay commissions at the rate contemplated when the 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 the instant case, whether or not we regard the agreement of August 1917 as still in effect, the long years during which that agreement was operative would in the judgment of the Referee fortify the position which he took in Decision on TE-271 (Award 297).

As in that case, the Referee is aware that in holding the railway concerned and the Railway Express Agency, Inc., jointly and severally liable under agreements in which express commissions constitute a factor in the wage structure of agents, the question remains open whether to make the Railway or the Railway Express Agency or the two together respondents in cases involving express commissions. Repeating the language of the decision in Award 297 (Docket TE-271), "The answer to that question would naturally depend upon the language of the particular agreement and the circumstances surrounding the case." In that case the Railway Express Agency, Inc., and the railway were both participants in the change in commissions of which complaint was made. The Referee held in that case that the petitioners would have been within their rights under the agreement and under the Amended Railway Labor Act to have haled the railway and the Railway Express Agency jointly before the Board; he also held that they were equally within their rights in making the Railway the respondent.

In the instant case, the long history of contractual relationships between the predecessors of the Railway Express Agency, Inc., and the joint agents makes it proper for the representatives of the joint agents, the O. R. T., to hale the Railway Express Agency before this Board. Since the O. R. T. has long been the acknowledged representative of agents in their dealings with the railways and is now officially recognized as such representatives, the Referee holds that the capacity in which D. May signed the agreement of August 1917 is not material to the issues of this case.

Courts are frequently called upon to resolve legal impasses of the kind which would result from a strictly legalistic interpretation of the contentions which have been advanced in this case. The high authority of the Supreme Court of the United States may be invoked for applying the rule of reason to an impasse of this kind and that is the way in which the Referee has been disposed to approach this decision. He, therefore, holds that the petitioners are within their rights in haling the Railway Express Agency, Inc., before this Board.

AWARD

Let the case be heard on its merits.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

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