

Award No. 2731

Docket No. TE-2631

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, 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 effective May 9, 1935, the joint agent of the Southern Pacific Company, Pacific Lines, and the Railway Express Agency, Inc. at Mecca, California, Los Angeles Division, be compensated at a commission rate of 10% on all less carload business handled, payment under this claim terminating on January 10, 1941.

EMPLOYEES' STATEMENT OF FACTS: On November 2, 1934, Claimant Kirkland notified the Railway Express Agency, Inc., of his desire to cancel the agreement then in effect between himself and the Railway Express Agency, Inc. On November 16, 1934, Mr. Thompson, Superintendent of the Railway Express Agency, Inc., replied to the communication addressed him by Claimant Kirkland, stating that no provision was made in the contract for cancellation but that the contract must be executed until dissolved by mutual agreement or in other words, the Railway Express Agency representative attempted to set up that the contract was in perpetuity.

Subsequently, on April 9, 1935, Claimant served thirty days' notice upon the Railway Express Agency, Inc., for cancellation of the agreement and under date of April 27, 1935, the Railway Express Agency, Inc., through its representative, Superintendent Thompson, reiterated the expressions made by them under date of November 16, 1934 as to the perpetuity of the contract as relates to the Claimant. The document termed a contract by the Railway Express Agency, Inc. was not signed by the Railway Express Agency, Inc. It was signed only by the Claimant.

As a part of the thirty days' notice served upon the Railway Express Agency, Inc. by the Claimant, which requested that the Claimant be relieved from all service rendered the Railway Express Agency, Inc., the stipulation was also included that if the Claimant was not relieved of all service performed by him for the Railway Express Agency, Inc., he would continue such service at a straight 10% commission on all less carload and \$10.00 per carload.

There is an agreement in effect between the parties to this dispute and copy of that agreement is on file with this Board.

POSITION OF EMPLOYEES: The claim is filed and prosecuted under Rule 33 (c) of the effective agreement, which we quote for ready reference:

"RULE 33

Express and Telegraph Commissions

(c) Telegraphers required to serve express or commercial telegraph companies will have the right to complain of unsatisfactory

In other words the contract of March 24, 1931 did not merely impose obligations upon the claimant, it likewise imposed obligations upon the Express Agency.

The mere fact that by virtue of certain circumstances beyond the control of the Express Agency the claimant did not benefit under the contract to the extent he though he should is no basis for a contention that the claimant should have been relieved of his obligations under the contract or that the Express Agency in refusing to relieve the claimant of his obligations under the contract thereby improperly treated the claimant.

Merely because the claimant considered that he was being unsatisfactorily treated is not sufficient; unsatisfactory treatment in fact must have existed and having established that unsatisfactory treatment in fact did not exist, the complaint by the claimant was without merit.

CONCLUSION

The carrier asserts that it has established that the claim in this docket is without basis or merit and therefore respectfully submits that it should be denied.

OPINION OF BOARD: Prior to April 1, 1931, the commission rate of the Railway Express Agent at Mecca, California, was 10% on L. C. L. and \$10.00 on carload business. As of the above date the Agent and the Company entered into a special agreement, fixing said commissions at 10% on the first \$1,500 of business, 5% on business over \$1,500, and \$10.00 per car on carload business. The Agent gave notice of the termination of said agreement, effective May 9, 1935, and on January 10, 1941, the Carrier set up a new method of handling express business at Mecca. The claim is, therefore, for straight 10% commissions on all less than carload business handled at said point from May 9, 1935 to January 10, 1941, against which the Carrier is, in all events, entitled to credit for the sums heretofore paid for said service under the agreement of April 1, 1931.

The Carrier contends that the agreement of April 1, 1931, was valid and that the claimant's so-called notice of cancellation amounted to nothing more than a demand for an increase of compensation. In this connection Award 548, and its subsequent history, is in point. That Award was carried to the courts for enforcement and finally reached the highest tribunal in the land. In stating the issue the Supreme Court said:

"For purposes of decision, however, we assume voluntary assent and that but for provisions of the Railway Labor Act valid individual contracts resulted."

By that assumption the Court gave full recognition to all that is claimed by the Carrier in the present case. The Court summed up its consideration of the subject with the following unequivocal declaration:

"We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the carrier's efforts to modify the terms through individual agreements was not effective."

We must conclude, as we did in Award 2602, that we are bound by the judicial decision in the case of *The Order of Railroad Telegraphers v. Railway Express Agency, Inc.* (1944), ——— U. S. ———, 64 S. Ct. 582, 88 L. ed. 495.

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 employes involved in this dispute are respectively carrier and employes 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.