ORT CASE: 3194
AWARD NO. 1
DOCKET NO. 1

SPECIAL BOARD OF ADJUSTMENT NO. 506

THE ORDER OF RAILROAD TELEGRAPHERS
vs.
MISSOURI PACIFIC RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

"Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad (Gulf District), that:

CASE NO. 1

1. Carrier violated the Agreement between the parties when on the 17th day of November, 1959, at 6:30 P.M., it required and permitted MPFT Truck-driver Frank Devine, an employe not covered by Telegraphers' Agreement, to sign bill of lading for piggy-back trailer RC-733 at Edinburg, Texas.

2. Carrier shall be required to compensate R. H. Milligan, Agent-Telegrapher, Edinburg, Texas, for one call, two hours, at time and one-half pro rata rate.

CASE NO. 2

1. Carrier violated the Agreement between the parties when on the 28th day of December 1959, at 8:45 P.M., it required and permitted MPFT Truck-driver Pete Sanchez, an employe not covered by Telegraphers' Agreement, to sign bill of lading for piggy-back trailer RC-722 at Edinburg, Texas.

2. Carrier shall be required to compensate R. H. Milligan, Agent-Telegrapher, Edinburg, Texas, for one call, two hours, at time and one-half pro rata rate.

CASE NO. 3

1. Carrier violated the Agreement between the parties when on the 7th day of January 1960, at 7:45 P.M., it required and permitted MPFT Truck-driver, an employe not covered by the Telegraphers' Agreement, to sign bill of lading for piggy-back trailer RC-709 at Edinburg, Texas.

2. Carrier shall be required to compensate R. H. Milligan, Agent-Telegrapher, Edinburg, Texas, for one call, two hours, at time and one-half pro rata rate.

CASE NO. 4

1. Carrier violated the Agreement between the parties when on January 8, 1960, at 8:00 P.M., it required and permitted MPFT Truckdriver, an employe not covered by Telegraphers' Agreement, to sign bill of lading for piggy-back trailer RC-755 at Edinburg, Texas.

2. Carrier shall be required to compensate R. H. Milligan, Agent-Telegrapher, Edinburg, Texas, for one call, two hours, at time and one-half pro rata rate.

CASE NO. 5

1. Carrier violated the Agreement between the parties when on January 9, 1960, at 1:45 A.M., it required and permitted MPFT Truckdriver, an employe not covered by Telegraphers' Agreement, to sign bill of lading for piggy-back trailer RC-733 at Edinburg, Texas.

2. Carrier shall be required to compensate R. H. Milligan, Agent-Telegrapher, Edinburg, Texas, for one call, two hours, at time and one-half pro rata rate."

OPINION OF BOARD:

Each of the five claims in this case involves the same claimant, the same location and the same basic circumstances. Claimant, at all times involved here, was the regularly assigned Agent-Telegrapher at Edinburg, Texas, a one-man station, with work hours 9 a.m. to 6 p.m. Monday through Saturday. On each of the dates in the claims at a time when Claimant was off duty a truck driver of the Missouri Pacific Freight Transport Company picked up a loaded trailer at a vegetable shed at or near Edinburg, signed a bill of lading therefor and transported the trailer to Harlingen where it was placed on a flat car for movement out of Harlingen over Carrier's Railroad. This is commonly referred to as a piggy-back movement. At Harlingen clerical employes of Carrier prepared for each trailer a freight bill showing car number, trailer number, shipper at Edinburg, Consignee description of lading, weight and freight charges with Edinburg shown as the point of origin. Claim was submitted in each instance for one call of two hours at the time and one-half rate in favor of the Claimant on the ground that the work of signing bills of lading at Edinburg belonged to Claimant, the Agent-Telegrapher. The claim was denied by Carrier and appealed through the various steps and is properly before this Board.

The Employes base their case principally upon the proposition that all work at a one-man station belongs to the Agent-Telegrapher, a position within Rule 1 (The Scope Rule) of the Agreement. Since Edinburg was a one-man station, they contend that the work of signing bills of lading for shipments originating there belonged to Claimant and that in permitting or requiring the truck drivers to sign bills of lading for these piggy-back trailers, the Company violated the Agreement.

Carrier asserts first that the signing of bills of lading is not work reserved exclusively to any one craft or class of employes. Next it denies that the

Agent-Telegrapher has the right to all the work, including signing of bills of lading, at a one-man station. But even conceding the existence of such a rule, Carrier argues that the alleged rule applies only to regular railroad work and does not apply to work contracted out, such as that to MPFT in this case. In this connection Carrier contends that these trailer shipments picked up at Edinburg by MPFT truck drivers are strictly MPFT business and remain such until the trailers are turned over to the Railroad Company at Harlingen; that up to this point the Railroad Company has nothing to do with the shipments and has no jurisdiction over them. Thus Carrier says Claimant had no right to the work of signing bills of lading for these trailers since the work did not belong to Carrier.

We agree with Carrier's first contention, i.e., that the signing of bills of lading is not work reserved exclusively to any one craft or class of employes. This proposition is not contested by the Employes in this case. They put their entire case on the principle that all work at a one-man station belongs to the Agent-Telegrapher. Although denied by the Carrier, the proposition appears to be well established by Awards of the Third Division. In Award 6975, involving bills of lading, Referee Carter said:

> "The work in question can under certain circumstances be performed by others than telegraphers. We have held many times, however, that station work in one-man stations belongs to the Agent, a position within the scope of the Telegraphers' Agreement. Station work outside the hours assigned to the Agent of a one-man station is also work that belongs to the station-agent. Awards 4392, 5993. The decision in the present case is based on the fact that the Agent-Telegrapher at a one-man station owns all the work at that point and not on the ground that signing bills of lading and billing cars is the exclusive work of a Telegrapher."

To the same effect in Award 7590 (Larkin).

But Carrier says that this applies only to railroad work, i.e., movements entirely by rail and does not apply to these trailer shipments which are picked up by MPFT drivers and taken to Harlingen for loading on the Carrier's flat cars. Carrier reasons that this is not railroad work, and that Carrier has no control over it. With this we cannot agree. A thorough study of the record convinces us that it is railroad work over which the Carrier has control. Among the reasons leading us to this conclusion are the following: (1) It was business solicited by the Carrier. (2) The bills of lading issued by the truck drivers were on Carrier's uniform bill of lading forms. While not controlling this is certainly evidence that the shipments were railroad shipments. (3) While MPFT is a separate corporate entity, it is wholly owned and controlled by Carrier. (4) The trailers are supplied by Carrier and it contracts with MPFT for drivers and tractors to place the trailers at the loading sites and to pick up the loaded trailers and deliver them to Carrier's ramps at Harlingen. (5) Carrier authorized the truck drivers to sign the bills of lading. (6) The shipments showed Edinburg as the point of origin and the shipments were billed on through rates for "demountable trailer body service." (7) Shippers at Edinburg consider these shipments as rail shipments and usually order the trailers

through Carrier's Agent at Edinburg or Freight Agent at Harlingen. (8) This service at Edinburg began in September, 1957, and for almost two years Claimant handled the bills of lading during his regular hours and on call after hours. It was about the middle of 1959 when Carrier instructed Claimant not to accept any more calls and advised him that in the future the truck drivers would sign the bills of lading on the trailer shipments and take them to Harlingen to be waybilled.

The mere fact that these piggy-back shipments were a new type of service inaugurated after the present contract was signed does not mean that the work of signing bills of lading in connection therewith is not controlled by the contract. Since the shipments belonged to the Carrier and originated at Edinburg, we are of the opinion that under established principles, the Claimant was entitled to the work.

Carrier has argued that a sustaining award in this case would sever its jugular vein. We cannot believe that this statement was meant to be taken seriously. But we hasten to point out that the function of this Board is to interpret and apply the contract between the parties according to our best judgment. Since a thorough study of the record has led us to the conclusion that the work in question belongs to the Claimant, we cannot be swayed from our decision by the argument that it will cost Carrier money. While it may be more convenient and less expensive to Carrier to have truck drivers sign the bills of lading, this alone cannot justify a decision in Carrier's favor.

In reaching its decision the Board has given no consideration to new evidence offered by Carrier for the first time when the Referee's proposed award came before the Board for adoption. Adjustment Boards have normally followed the salutary principle of refusing to consider evidence not presented during the progress of the case on the property. In this instance we think the evidence comes much too late when it is offered some six weeks after the close of the hearing.

For the reasons expressed above, we hold that the Agreement was violated.

FINDINGS: That Carrier violated the Agreement.

AWARD

Claim sustained.

SPECIAL BOARD OF ADJUSTMENT NO. 506

s/ Roy R. Ray
Roy R. Ray - Chairman

s/ D. A. Bobo
D. A. Bobo - Employe Member

Dissenting
G. W. Johnson - Carrier member

St. Louis, Missouri
August 20, 1963
File 279-140

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CARRIER MEMBER'S DISSENT TO AWARD NO. 1
SPECIAL BOARD OF ADJUSTMENT NO. 506
(O.R.T. versus Mo.Pac.RR)

The majority has committeed palpable error which compels this dissent.

The facts placed before the Board are as follows:

The Missouri Pacific Freight Transport Company was incorporated on April 5, 1938, as an over-the-highway common carrier by truck and operates pursuant to Certificates of Public Convenience and Necessity, duly issued by the I.C.C. and various Public Service Commissions of the States in which it operates as an over-the-highway common carrier, which includes the State of Texas. The truck drivers who signed the bills of lading prepared by shippers authorizing the movement of loaded "piggy-back" trailers over the highway between Edinburg and Harlingen, Texas, a distance of approximately 35 miles, were employes of the MPFT Company and subject to the rules, regulations and instructions issued by the MPFT Company for the government of its employes.

As a duly authorized over-the-highway common carrier by truck, the MPFT Company was solely responsible for the "piggy-back" trailers and the lading contained therein from the moment the empty trailers were removed from railroad flat cars at Harlingen, the rail-truck ramp point, until reloaded on railroad flat cars at Harlingen and tied down for movement by rail.

These facts being undisputed, the error made by the majority in sustaining these claims is clearly demonstrated by the fact that the only violative act alleged by the Employes in their Statements of Claim is the signing of bills of lading for "piggy-back" trailers by MPFT truck drivers, which the majority rejected in the following language:

> "We agree with Carrier's first contention, i.e., that the signing of bills of lading is not work reserved exclusively to any one craft or class of employes."

Since the signing of bills of lading is nowhere to be found in the scope or any rule contained in the Telegraphers' Agreement and the majority found that the signing of bills of lading is not work reserved exclusively to any class or craft of employes, then it seems obvious that a denial award would have been required even if the bills of lading covered railroad freight, which they did not. This is true because the scope rule merely lists positions and not work, and it is well settled that the only work which can be said to attach to positions listed in scope rules is work which has historically and traditionally been performed by occupants of such scope rule positions, exclusively.

After agreeing with the Carrier that the signing of bills of lading is not reserved exclusively to any class or craft of employes, which was the only violative act alleged by the Employes, the majority fell into grave error when they relied upon Third Division Awards 6975 and 7590 and awards there cited to the effect that all work at a one-man station belongs to the agent. Aside from the fact there is no Agreement support for such a broad general statement contained in said awards, even if this "theory" is sound, which it is not, it has never been applied to work which does not belong to nor controlled by the railroad company, which is the only party to the collective bargaining agreement with the Telegraphers' Organization here in evidence. It is significant to note that the

awards cited and relied upon by the majority to support a sustaining award in the instant disputes involved work which admittedly was railroad work; there being no truck movement involved in any of those awards.

The Carrier repeatedly informed the Board in its submission, and also during the hearings before the Board, that the signing of bills of lading covering loaded "piggy-back" trailers for over-the-highway movement by the MPFT Company was (1) not work belonging to the Railroad Company, (2) the Railroad Company issued no instructions to truck drivers of the MPFT Company, and (3) the signing of bills of lading covering loaded "piggy-back" trailers for over-the-highway movement was not work at the station of Edinburg, nor was it performed at the station.

Before the award was adopted by the majority, the Carrier made available to the Board Third Division Award 6066 (Referee Wenke) which involved the work performed by the Rio Grande Motor Way, Inc., a wholly owned truck subsidiary of The Denver and Rio Grande Western Railroad Company, in hauling LCL freight shipments from Salt Lake to Price, Utah, which had previously moved by railroad. The award held in part as follows:

> "Here the Carrier contracted with the Rio Grande Motorway, Inc., to haul its LCL freight shipments from Salt Lake to Price for consignees at Price and points adjacent thereto. This it had a right to do. See First Division Awards 6317, 11791 and 11792. The checking and handling of this LCL freight at Price, done in order to deliver it to the consignees or their agents, completed the hauling of this freight by the Rio Grande Motorway, Inc., and an incident thereof. After the LCL freight shipments were turned over to the trucking company at Salt Lake the work in connection therewith no longer existed with this Carrier in the prosecution of its business. It was no longer a railroad operation."

As support for this finding, the Board in that case cited First Division Awards 6317, 11791 and 11792. These three First Division awards, two of which involve this same property, held that the railroad had the right to determine the mode of transport of its freight and denied the claims of engineers, brakemen and conductors based upon an alleged violation of their collective bargaining agreements with the railroad because certain freight was diverted to an over-the-highway truck line pursuant to the contract made between the carrier and said truck lines.

Fourth Division Award 1659 was also discussed before the Board; said award having denied claims of the Lighter Captains Union that the Pennsylvania Railroad Company had violated their agreement when the carrier used trucks instead of barges or lighters to transport freight between railroads in New Jersey and various points in the New York Harbor area. The Board stated:

> "Unless there is clear contract authority to the contrary, this Board is not disposed to hold that a carrier may not move freight by any means it finds economically feasible. Accordingly, it is essential to Petitioner's case that it affirmatively establish that Carrier is required to transport freight by water in the present situation."

Third Division Award 11541 was also presented to the Board which denied claims of clerical employes of the Cotton Belt at Jonesboro, Arkansas, because an employe of the Southwestern Transportation Company, a wholly owned truck subsidiary of the Cotton Belt, performed some clerical work in connection with the preparation of expense bills covering 2872 lbs. of LCL freight; the award holding that this was work of the truck company because the freight covered by such bills was in the possession of the truck company.

Award 39 of Special Board of Adjustment No. 169, Brotherhood of Railway Clerks versus Cotton Belt (Referee Frank P. Douglass), was also presented to the Board. In that award it was held:

> "Until the freight brought in on a truck is actually delivered to the possession of the Railroad Company the employees of the Railway Company have no contractual right to demand any performance in connection with that freight."

Award 7 of Special Board No. 171, Brotherhood of Railway Clerks versus Great Northern Railway Company, denied a similar claim, finding

> "That the particular service in dispute is performed after the freight has left the property of the Carrier and when it is subject to the control and responsibility of the contract motor transport company, and is performed independent of the railroad and is not in the strict sense a railroad service."

After having found that no class or craft of employes has the exclusive right to sign bills of lading, which is the only violative act alleged by the Employes, in paragraph 5 the majority lists eight "reasons" why they cannot agree the action of the truck drivers in signing bills of lading was Truck Company work. These reasons include business solicited by the railroad, use of bills of lading for demountable trailer body service, trailers supplied by the railroad pursuant to contract, MPFT Company a wholly owned subsidiary, Carrier authorized truck drivers to sign bills of lading, shippers thought they were doing business with the railroad and the fact that the claimant had theretofore enjoyed the work of signing bills of lading covering loaded "piggy-back" trailers transported by the MPFT Company over the highway to Harlingen.

These "reasons" are of no significance whatsoever when viewed in the light of the undisputed facts that the MPFT Company had sole custody and control of these trailers from the moment they were coupled into for removal from railroad flat cars at Harlingen, 35 miles distance from Edinburg, until placed at shippers' door, and from time coupled into at shippers' door until they were again loaded on railroad flat cars at Harlingen, thereby delivering said trailers and lading into the custody of the Missouri Pacific Railroad Company. These "reasons" listed by the majority tend to indicate their lack of understanding of the legal relationship between separate corporations and the manner in which they are controlled and operated, whether either is a wholly owned subsidiary of the other or not. The fact remains that there exists no collective bargaining agreement between the O.R.T. and the MPFT Company and the Employes have not contended that such an agreement exists. Obviously, the collective bargaining agreement between the O.R.T. and the Missouri Pacific Railroad Company does not and cannot reach out and cover work belonging to the MPFT Company which is not a party to said agreement.

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By reason of the contention that the Missouri Pacific Railroad Company "controlled" the MPFT Company, the Board was furnished copy of Award 45 of Special Board No. 279, Brotherhood of Maintenance of Way Employes versus Missouri Pacific Railroad, which held that the MPFT Company is a separate corporation and that

> "It seems obvious that the agreement of this Carrier with this Organization does not extend to the operations of such other corporation and hence cannot govern who should perform construction work for it."

Award 21 of Special Board No. 239, Brotherhood of Railway Clerks versus Missouri Pacific Railroad Company, was also presented to the Board, which denied claims of vehicle clerks because the MPFT Company removed a "piggy-back" trailer loaded with LCL shipments from a flat car at Monroe and delivered the shipments contained therein direct to the consignees performing the necessary paper work in connection therewith. In its Opinion the Board stated in part as follows:

> "We do not believe it admits of dispute that Carrier has added a service that was not contemplated nor in use at the time the memoranda of agreements were executed to cover the handling of store-door pick-up and delivery of LCL freight with railroad equipment and employes. The new service is one for handling single shipments by piggy-back connection with other carriers and is a new type of freight movement that is enjoying growing acceptance by shippers, railroads and over-the-road motor freight carriers. Although, as in the instant case, the shipments may be and are sometimes billed by the railroads as LCL freight, the shipments are not the same as were being handled generally as LCL in connection with Carrier's freighthouse operations for which the memoranda of agreements here in question were negotiated. *** .
>
> Piggy-back service usually is one of interchange between over-the-road motor freight carriers and the railroads. The movements over the roads and highways are handled by motor freight carriers to and from the lines of the rail carriers where the truck trailer is loaded onto or unloaded from railroad flat cars for or after rail movement. The railroad warehouse facilities serve no useful purpose and warehouse employes, such as Vehicle Clerks, have no interest in or claim to the work, as we view it."

Notwithstanding the uniform holdings of all of the foregoing awards involving coordinated rail-truck service which were made available to the Board before the majority reached its conclusion, the majority persisted in following Third Division Awards which involved railroad work only, and are for that reason clearly not in point here.

For these reasons the majority committed grave error, hence this dissent.

/s/ G. W. Johnson
G. W. Johnson - Carrier Member.

St. Louis, Missouri
August 30, 1963