Award No. 4198
Docket No. 3909
2-HBL-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

HARBOR BELT LINE RAILROAD

DISPUTE: CLAIM OF EMPLOYES:

1. That performance of work by Pacific Fruit Express Employes on cars in transit, permanently or temporarily, on Harbor Belt Line Railroad premises, is work belonging to employes of the Harbor Belt Line Railroad and who are amply covered by Agreement between Harbor Belt Line Railroad and its Employes who are represented by System Federation No. 114, Railway Employes' Department, American Federation of Labor, and which work is now being performed by Pacific Fruit Express employes in violation of Rules 20, 21, 39 and paragraph (b) of Rule 41 of aforementioned Agreement.

2. That Carrier improperly transferred and assigned the performance of said work to Pacific Fruit Express employes who are not covered by any agreement on the Harbor Belt Line Railroad, and are performing said work to the deprivation of Harbor Belt Line Railroad Employes, as represented by System Federation No. 114.

3. That accordingly the Carrier be ordered to cease and restore said work to Harbor Belt Line Railroad Employes in view of the fact that Harbor Belt Line Railroad Employes have a recognized agreement, and the employes of the Pacific Fruit Express Company do not have such an agreement on the Harbor Belt Line Railroad property.

EMPLOYES' STATEMENT OF FACTS: **That carmen of the Pacific Fruit Express are performing work belonging to carmen of the Harbor Belt Line Railroad at Wilmington, California, and other property of the carrier, which work consists of inspecting and doing light repairs to Pacific Fruit Express refrigerator cars assigned to banana service, as well as other railroad cars which traverse Harbor Belt Line Railroad facilities.**

This dispute has been handled in accordance with the provisions of the Agreement between Harbor Belt Line Railroad employes and carrier, and which agreement **became effective August 1, 1939,** and has been in effect henceforth,

3. That the Board dismiss the dispute because of abandonment by the employes; or,

4. That a denial award be made upon the basis that there has been no violation of any rule of the collective agreement.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

Parties to said dispute were given due notice of hearing thereon.

The carrier is a joint operating agency for the unified operation of railroad facilities at Los Angeles Harbor, California, on behalf of the Board of Harbor Commissioners of the City of Los Angeles and several railroad companies. The Carrier's operations are confined to the greater Los Angeles Harbor area which includes docks, wharfs and similar maritime facilities. The Carrier also maintains a yard known as the McFarland Yard. The installations at Los Angeles Harbor include a facility where extensive railroad operations are being conducted in connection with loading bananas directly to railroad refrigerator cars for subsequent delivery by the member line railroads to points outside the zone of operation of the Carrier. The refrigerator cars are not owned by the Carrier but the necessary switching of such cars is handled by the Carrier's switching crews.

The Pacific Fruit Express Company (hereinafter referred to as "Pacific Fruit") has assigned a certain number of its refrigerator cars to the Carrier's zone of operation for exclusive use in banana service. In addition, refrigerator cars owned by various railroad companies are sometimes assigned to Pacific Fruit which, in turn, uses them temporarily in banana service. The refrigerator cars owned by or assigned to Pacific Fruit are generally stored in the McFarland Yard or on tracks adjacent to the banana docks. Two tracks at said Yard have been assigned to Pacific Fruit for the purpose of permitting it to clean and maintain the cars as well as to perform light repairs thereon.

Prior to April 1, 1955, Pacific Fruit assigned its employes from Los Angeles to perform such maintenance and repair work on the refrigerator cars. Thereafter, a Pacific Fruit mechanical crew was assigned to McFarland Yard to perform said work. At the time here relevant, this crew consisted of a Foreman Inspector covered by a labor agreement between Pacific Fruit and the American Railway Supervisors Association as well as of two carmen and two laborers covered by a labor agreement between Pacific Fruit and the Brotherhood of Railway Carmen of America a different sub-division of which is here involved.

In 1959, the Organization filed a grievance in which it complained that two carmen of Pacific Fruit had performed car inspecting and light repair work on Pacific Fruit refrigerator cars in violation of the labor agreement between the Carrier and the Organization, effective as of August 1, 1939. It requested compensation for two carmen (R. B. Futrell and E. E. Lindsley) who are employed by the Carrier, in amount equal to that earned by the two Pacific Fruit carmen. After the usual procedures, the Carrier denied the grievance.

1. In support of its claim, the Organization primarily relies on Rules 20 (Seniority), 21 (Assignment of Work), 39 (Classification of Carmen's Work), and 41-b (Car Inspectors) of the labor agreement. These Rules would be here applicable only if the work in dispute would come within the scope of the agreement. In order to determine whether said Rules sustain the claim in question it is necessary, therefore, to read them together wth the Rule defining the scope of the agreement. See: Awards 1556, 2198, and 4129 of the Second Division. The Rule defining the scope of the agreement precedes the General Rules and is headed "AGREEMENT." It reads, as far as pertinent, as follows:

> "This Agreement governs the rates of pay, rules and working conditions of * * * carmen, car inspectors and their helpers, and other employes, who perform work coming within the scope of this Agreement in the Mechanical Department of the Harbor Belt Line Railroad, and who are represented by System Federation No. 114 * * * Mechanical Section Thereof."

A careful reading of the "Agreement" Rule defining the scope of the labor agreement has convinced us that its wording is neither clear nor unambiguous. Plausible contentions can be made for different interpretations. Specifically, the language used therein may raise a justifiable doubt as to whether the scope of the agreement covers all carmen's and car inspectors' work performed within the geographical area or zone of operation of the Carrier, as asserted by the Organization, or whether the scope of the agreement is confined to work which the Carrier has the power to assign and which comes under the control and jurisdiction of the Mechanical Department, as asserted by the Carrier. The "Agreement" Rule is therefore, subject to a reasonable construction. A basic principle commonly observed in the interpretation of a written labor agreement the meaning of which is doubtful is to ascertain, as far as possible, the apparent or obvious intent of the parties as evidenced by long-continued custom or practice consistently followed and generally accepted by the parties to the agreement. This principle is based on the premise that, for the purpose of ascertaining the true intention of the parties to such an agreement, their consistent and long-continued actions or conduct might be even more important than what they say or do not say in the agreement. See: Awards 3873 and 4130 of the Second Division.

In applying the above principle to this case, we have reached the following conclusions:

The Carrier contends that, prior to the effective date of the labor agreement (August 1, 1939) as well as during the life thereof, Pacific Fruit employes have consistently performed maintenance and repair work of the nature here involved on Pacific Fruit refrigerator cars within the confines of the zone of its (the Carrier's) operation. The Organization has denied the existence of such custom or practice. However, the evidence on the record considered as a whole convincingly sustains the Carrier's contention.

Accordingly, we hold that a consistent and long-continued practice well-known to and accepted by all interested parties has existed under which the parties have construed the "Agreement" Rule to mean that maintenance and light repair work performed by employes of Pacific Fruit on the refrigerator cars in question under the control and supervision of Pacific Fruit and not of the Carrier has been outside the scope of the labor agreement, notwithstanding the fact that such work was performed within geographical area or zone of operation of the Carrier. This practice has become a part of the

"Agreement" Rule although not explicitly expressed in it. See: United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U. S. 574 582; 80 S. Ct. 1347, 1352 (1960). To bring the work under consideration within the scope of the agreement would thus require a modification of the "Agreement" Rule. Section 3, First (i) of the Railway Labor Act does not authorize us to do this.

Accordingly, we hold that the Rules of the labor agreement on which the Organization relies do not support the instant claim because the work in question is not covered by the agreement.

2. Since we have denied the instant claim on its merits, it becomes unnecessary to rule on the Carrier's procedural objections and we express no opinion on the validity thereof.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman,
Executive Secretary

Dated at Chicago, Illinois, this 27th day of May 1963.

DISSENT OF LABOR MEMBERS TO AWARD 4198

The majority's statement that "Since we have denied the instant claim on its merits, it becomes unnecessary to rule on the Carrier's procedural objections * * *" is misleading. Kirby v. Pennsylvania R. Co., (188 Fed. 2d, 793) required the Board to overrule the carrier's objections. If the majority had followed that court case it would have determined that the Pacific Fruit Express and its employes were complete strangers to the present dispute.

The Board took jurisdiction of the present dispute because the respondent is a carrier within Section 1 First of the Railway Labor Act and its employes are employes within Section 1 Fifth of said Act. Ownership of the cars involved is not the deciding factor. McFarland Yard, where the instant work is performed is, according to the carrier's own statement, within the territory comprising the Harbor Belt Line Railroad and the work performed is inspecting and repairing, thus the work under consideration is within the scope of the agreement. What the majority refers to as the agreement rule defining the scope of the governing agreement is the preamble, as will be noted from referral to the agreement index. Rule 31, which is the scope rule, reads as follows:

> "Except as provided for under the Special Rules of each craft covered by this Agreement, the General Rules shall govern in all cases."

The work under consideration is work within Special Rules 39 and 41(b) of the governing agreement between the Harbor Belt Line Railroad and

its employes represented by System Federation No. 114. This being the case and the majority realizing, according to its findings, that Section 3 First (i) of the Railway Labor Act does not authorize the Board to modify an agreement, we are at a loss to understand why it has attempted to read the work under consideration out of the scope of the controlling agreement.

The findings of the majority uphold the carrier in an evasion of the controlling agreement and violate the spirit and command of the Railway Labor Act "to * * * maintain agreements concerning rates of pay, rules, and working conditions * * *" Order of Railroad Telegraphers v. Railway Express Agency, 64 Sup. Court Rep. 582.

LABOR MEMBERS

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

E. J. McDermott

James B. Zink