Award No. 5703
Docket No. CL-5648

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

FRUIT GROWERS EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Brotherhood) that the Fruit Growers Express Company (hereinafter referred to as the Express Company violated the Clerks' Agreement:

1. When, the Express Company refused and continues to refuse to compensate our employes, at the penalty time rate, for holiday work performed on September 7th, 1949, where September 5th and 6th, 1949, were the assigned rest days of a position, and

2. That all employes affected by said violation of our "Agreement", be reimbursed for loss of penalty pay, sustained on September 7th, 1949, and on all days subsequent thereto, considered the holiday, where a like situation existed.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement, effective April 1st, 1943, covering Clerical, Office, Station and Storehouse Employes between the Express Company and this "Brotherhood".

The Claimants in this case are employes holding regular positions covered by the Scope of that Rules Agreement.

In instances where New Year's Day, Washington's Birthday, Decoration Day or Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas, have fallen on an assigned day off duty, the following work day has always, to our knowledge, been considered the holiday for that position.

There has never been any prior dispute on this matter, as the Express Company, to our knowledge, has religiously observed the obvious intent of our "Holiday Work Rule".

POSITION OF EMPLOYES: Rule 31(c) of our current "Agreement" states:

> "When one of the specified holidays falls on the assigned day off duty, the following day shall be considered the holiday for that position."

When such a holiday falls on the second assigned rest day, other than Sunday, of an employe's work week, the day following will be considered his holiday.

POSITION OF COMPANY: Labor Day, Monday Sept. 5, 1949 was the cited holiday. There was no "work performed on" it, nor on the "following day", to take the penalty rate. Wednesday the 7th was neither a holiday, nor the day officially observed as one, nor the day following either. In particular, it was not "**the day following** a holiday which fell on an assigned day off duty" defined by Rule 31(c).

That Rule—on its face, and especially in view of its long consistent practical application, its self-evident intent confirmed by said Decision No. 22, and the compromise adopting the Rule but rejecting the Brotherhood's said proposal to amend it—can not lawfully be stretched to make "holiday work", as alleged, of work done on said Wednesday, nor on any day **two days removed from any holiday.** The Company therefore properly has paid straight time for work done on said Wednesday, and on all other days so situated.

There is not in the agreement any rule which forbids what the Company is doing, and always has done, by authority of Rule 31(c), nor which commands it to do what has not done; hence the contract can not have been "violated", and there can not lawfully be an affirmative award upon the Brotherhood's claim.

CONCLUSION

For all reasons given, the claim should in all things be denied and the Company respectfully requests that the Board so hold.

All relevant argumentative facts and data herein have heretofore been made known to the Brotherhood.

(Exhibits not reproduced).

OPINION OF BOARD: The immediate claim herein involved arises out of the Company's failure and refusal to compensate employes, with Monday and Tuesday as their rest days, at time and one-half for work performed on Wednesday, September 7, 1949. The claim is made under Rule 31 (c) of the parties' Agreement, effective September 1, 1949, and based on the fact that Monday, September 5, 1949, was Labor Day and one of the holidays specifically mentioned in Rule 31 (b). Claim is also made for all subsequent days when a like situation exists: that is, when one of the holidays enumerated in Rule 31 (b) falls on the first of two consecutive rest days of any employe covered by the parties' Agreement.

By Letter Agreement dated May 2, 1949 the parties to this dispute agreed that the National Forty-Hour Week Agreement should apply to employes of the Company represented by the Brotherhood and to revise their existing Agreement to conform thereto, which they did. Rule 31 (b) was revised and reads as follows:

> "(b) Holiday Work. Work performed on the following legal holidays, namely—New Year's Day, Washington's Birthday, Decoration Day or Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday the day observed by the State, Nation or by proclamation shall be considered the holiday) shall be paid for at the rate of time and one-half."

However, the parties could not agree as to any revision of Rule 31 (c) and it remains in the same language as it had been prior thereto. It is as follows:

"(c) When one of the specified holidays falls on the assigned day off duty, the following day shall be considered the holiday for that position."

This rule, prior to September 1, 1949, fully protected those employes occupying positions doing a class of work necessary to the continuous operation of the Company who, under then Rule 31 (a), could be and were required to work on Sundays at straight time, having one regular day off duty other than Sunday.

Because certain questions are raised in regard thereto it is desirable to restate certain principles relating to the Division when deciding questions presented to it.

The authority of this Division is limited to interpreting and applying the Rules agreed upon by the parties. If inequities among employes arise by reason thereof this Division is without authority to correct them as it has not been given equity powers. In other words, we cannot make a rule nor modify existing rules to prevent the inequities thus created. Renegotiation thereof in the manner provided by the Railway Labor Act is the proper source of authority for that purpose.

An attempt to obtain a more favorable and less controversial rule by negotiation does not constitute any limitation upon a rule already in existence.

When a portion of a written contract is carried forward verbatim into a new contract all interpretations of the old Agreement are carried forward into the new unless there is a declared intent to the contrary.

The question here presented relates to the basis of pay under Rule 31 (b) and (c) of the parties' Agreement after September 1, 1949, the effective date of the National Forty-Hour Week Agreement, for work performed on the first work day following two consecutive rest days, as provided for by Rule 23½ (a), when one of the holidays specified in Rule 31 (b) falls on the first of such rest days.

Prior to September 1, 1949 no difficulty arose in applying Rule 31 (c) as it could only have application to one class of employes: namely, those engaged in work who could be assigned a rest day other than Sunday. However, with the advent of the forty-hour-five-day week and two consecutive rest days for all positions, with certain exceptions not here material, an entirely different situation presented itself. The Company thereafter construed Rule 31 (c) to require time and one-half pay for work performed on the first work day following the two consecutive days of rest when a holiday specified in Rule 31 (b) falls on the second day thereof. The Brotherhood contends this application of Rule 31 (c) discriminates between employes under their Agreement with the Company and has the effect of destroying for some employes the benefit of a month consisting of 169⅓ hours of work at straight time as contemplated by Rule 44 (b). It would have us construe Rule 31 (c) to the effect that it would have to read: "When one of the specified holidays falls on either of two consecutive rest days the work day following such rest days shall be considered the holiday for that position."

The application now being made of the Rule by the Company will undoubtedly cause some inequities among the employes but, as we have already stated, this Division has no authority to modify existing rules nor enquiry powers to prevent inequities resulting from rules the parties have agreed to.

In five similar situations, when the parties could not agree to a revision when their Agreements contained similar or comparable rules, the disputes were presented to the Forty-Hour Week Committee provided for in the National Forty-Hour Week Agreement. That Committee had authority to render decisions to make existing individual agreements conform to the Forty-Hour Week Agreement when the parties could not do so themselves and presented their

problems to it. The Committee, in handling these disputes, was necessarily bound, as we are, in rendering its decision to give consideration to provision (d) of Section 3 of the National Forty-Hour Week Agreement, which provides: "Existing provisions relating to pay for holidays shall remain unchanged."

The Committee, in disposing of all five disputes without a referee, held: "When such a holiday falls on the second assigned rest day, other than Sunday, of an employe's work week, the day following will be considered his holiday." See Committee's Decision No. 22.

In view of the language of Rule 31 (c) of the parties' Agreement we think this ruling of the Committee is the only plausible interpretation thereof and since the application of Rule 31 (c) being made by the Company is in accordance therewith we find the claim here made to be without merit.

Whether or not the extension of such holiday for the purpose of requiring time and one-half pay for work performed makes it a holiday for the purpose of permitting it to be used for a reduction of the five-day Guarantee Rule 25 is not here involved and that question we do not in any way decide.

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 Company did not violate the Agreement.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of April, 1952.