Award No. 8411
Docket No. CL-7932

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

WESTERN FRUIT EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the rules of the current Agreement dated October 20, 1950

1. When on November 25, 1954 and December 25, 1954, holidays, the Carrier blanked a laborer's position held by Mike Weber and did not pay him or any other employe for these days and on November 25 and December 25, 1954 and January 1, 1955 they blanked a position held by Frank Nieland, Laborer, and failed to compensate him properly for these days. Also on November 25 and December 25, 1954 they blanked a position held by A. A. Kunkel and failed to pay him or any other employe for these days.

2. That the Carrier now be required to compensate Mike Weber for November 25, 1954, December 25, 1954 and January 1, 1955, holidays at the time and one-half rate and Frank Nieland eight hours at the time and one-half rate for November 25 and December 25, 1954 and January 1, 1955, and A. A. Kunkel eight hours at the time and one-half rate for November 25 and December 25, 1954 account not working these positions as provided for in the Agreement between the Carrier and the employes.

EMPLOYES' STATEMENT OF FACTS: Prior to the effective date of the Forty Hour Week, September 1, 1949, the Carrier and the representative of the employes met in Washington, D. C. July 29, 1949 and revised the Agreement between the Carrier and the employes. One of the rules revised was Rule 23½. The particular part of that rule which refers to this case was Paragraph (d) which at that time was a part of the so-called Work Week Rule suggested by the Emergency Panel in settling the dispute of the Forty Hour Week. This report of the Emergency Panel on the Work Week Rule was adopted and agreed to by the Carrier and the representative of the employes, but after the revision of July 29, 1949, the Carrier and the representative of

must be filled seven days a week under Rule 23½ (d). The procedure which was followed allowed the claimants to qualify for holiday pay under Rule 31 (d) and (f); the alternative procedure could well have defeated such payment.

7. Without direct negotiations with the Company and agreement by the parites, the Rules Agreement cannot be amended as the Brotherhood here desires to accomplish by interpretation. Certainly, the addition to Rule 23½ (d) of the words, "It is understood seven (7) day positions will be filled seven (7) days per week," cannot serve to change that rule into a guaranteed work week for Group 2 laborers, when the rule itself was put into the Agreement under the clearly stated principle in the National Agreement that "Nothing in this agreement shall be construed to create a guarantee of any number of hours or days of work where none now exists."

CONCLUSION.

The Company respectfully requests that the Board deny all parts of the claim herein.

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

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants were Group 2 laborers with regular five-day assignments on 7-day positions. Claimant Weber, working Monday through Friday and resting Saturday-Sunday, was not worked Thursday, November 25, 1954, and received straight-time pay therefor. He was also not worked on December 25, 1954, and January 1, 1955, Saturdays, and was not paid anything therefor. Claimant Nieland was likewise not worked on the three above-mentioned holidays. Because each of these days fell within his regularly assigned work-week, he received straight-time pay for each. Claimant Kunkel's situation was the same as Nieland's, except that January 1, 1955, was not involved.

In support of claims Employes cite Rule 23½ (d), the last sentence of which says that 7-day positions will be filled seven days per week. They argue that, because Carrier had no one else to fill the positions on said holidays, Claimants should have been used. Carrier defends mainly on the ground that the Parties' Agreement excludes Group 2 employes from any guarantee of work; and it was proper, therefore, to blank the positions on said holidays.

The Board holds that the issue in this case is no one of a guaranteed work-week, from which under Rule 25 certain holidays, including those here involved, are excepted. The question here is not whether Claimants were guaranteed work on these holidays by Rule 25 (which, by the Rule itself as well as by the implied exclusion of Group 2 employes from coverage of that Rule, they were not), but (1) whether the 7-day positions to which Claimants were assigned five days had to be filled on holidays; and (2) if so, by whom.

On question (1) above, Rules 23½ (a) and (d) are controlling. Rule 23½ (a), a general paragraph, makes it clear that, save for specified exceptions, the provisions of Rule 23½ apply to "all employes subject to this Agreement, except those under scope Rule 1 (d)." (Emphasis added.) (Scope Rule 1 (d) covers Chief Clerks, Car Distributor, Secretary, and

General Foremen.) In other words, Rule 23½ covers Group 2 employes such as Claimants, save for specified exceptions, as in Rule 23½ (c) in conjunction with Rule 25.

Rule 23½ (d) on Seven-Day positions contains a second sentence not found in most of the Clerks' Agreements. For such positions it requires the Carrier to have a man on the job each day of the week; and no exceptions are mentioned. We can find nothing in the Agreement which could be interpreted to justify any exception. This paragraph, then, is a guarantee—not that an employe working on such a position necessarily has any sort of personal guarantee of work but that the position itself will be occupied every day without exception. In other words, the blanking of a 7-day position on this Carrier's property under this Agreement on any day, holiday or otherwise, is not permissible.

Rule 23½ (c), by specific reference to Rule 25, permits the blanking of a 6-day position on holidays. The fact that this Rule contains such an exception highlights the absence of any exception in Rule 23½ (d).

As to question (2)—who should fill the 7-day positions on holidays—the Agreement contains several provisions on relief assignments. These need not be summarized here. It is enough to say that, given the requirement that 7-day positions must be filled (on holidays as well as other days), they are to be filled by relief men or extra men or by regular incumbents. The record of this case does not show that Carrier was able to use relief or extra men. It follows that Claimants should have been used.

It may be argued that the claims should be dismissed because not timely filed under Rule 56½. There is nothing in the record showing that this point was ever raised during discussions of the claim on the property or in hearing before this Board; and it may therefore be concluded that Carrier waived the point. Accordingly this Board is not now disposed to make a dismissal award on these grounds.

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

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July, 1958.

DISSENT TO AWARD NO. 8411, DOCKET NO. CL-7932

The majority opinion holds in part, "It may be argued that the claims should be dismissed because not timely filed under Rule 56½ * * *", and then proceeds to ignore Rule 56½ on the grounds there was nothing in the record to show this point was ever raised during discussions of this claim on the property or in the hearing before this Board; and then proceeds to hold "* * * and it may therefore be concluded that Carrier waived the point. Accordingly this Board is not now diposed to make a dismissal award on these grounds."

Exception must be taken to the statement, "It may be argued * * *" because the application of Rule 56½ to the dispute was most earnestly argued before the Referee, and he was presented with a number of Awards of this and the First Division of the Board holding to the effect that the entire agreement is before the Board at all times, and the application of any rule to a dispute can be raised at any time—regardless of the fact that a particular rule in the Agreement was not raised in the handling on the property or before this Board at the initial hearing. (First Division Award 15851 and our recent Award 8383, among others.)

The use of the word "may"—as used in the concluding paragraph of this Award—denotes speculation. (Award 2768.)

The time limits provided for in Rule 56½ may be extended by agreement between the parties, if they so desire, but no authority for unilateral waiving of these time limits is contained in that rule.

For the above reasons, we dissent.

/s/ C. P. DUGAN

/s/ J. F. MULLEN

/s/ R. M. BUTLER

/s/ W. H. CASTLE

/s J. E. KEMP