

Award No. 3833
Docket No. 3659
2-CNO&TP-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William E. Doyle when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

**THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC
RAILWAY COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier's refusal to allow Car Inspectors operating Echo-meter in train yards at Cincinnati, Ohio, to use blue signals is in violation of the current Agreement.

2. That the Carrier be ordered to allow said Car Inspectors to use blue signals in conformity with the Agreement.

EMPLOYES' STATEMENT OF FACTS: The Southern Railway System, hereinafter referred to as the carrier, operates a train yard at Cincinnati, Ohio, and the carrier requires train yard men (car inspectors) to perform their work of inspecting car journals with Echo-meter and other inspection work without the protection of blue signals.

Trains and cars are moved in and out of this yard at all times, including the moving of trains and cars on which train yard men (car inspectors) are inspecting car journals with Echo-meter and other inspection work.

The Echo-meter is an electro-magnetic device, or machine, mounted on a motorized vehicle which moves between tracks in train yard, the vehicle is guided or held on course by its side rails, rubbing or sliding on the ends of the ties. The car inspector stands, or kneels or sits on platform of vehicle, holding cable and contact unit (about the size of a rivet gun) which is firmly pressed against the end of car journals, triggered, and is supposed to indicate or record broken or defective journals. The motorized vehicle is powered by a gasoline motor, has small pneumatic wheels (about 12 inches) and travels about as fast as a long legged man could walk. Riding these vehicles is

Negotiators of Rule 158 could not therefore have had any knowledge of this testing instrument or the testing operation when they drafted the rule. It was not therefore intended, when Rule 158 was drafted, to confer any contract right upon carmen to display blue signals when riding on self-guided rubber-tired vehicles using the echometer to test freight car axle journals.

Carrier's refusal to permit car inspectors riding on self-guided rubber-tired vehicles testing freight car axle journals by use of the echometer is not therefore in violation of Rule 158 or any other provision of agreement in evidence. This fact will be further evidenced by a movie of the operation at Cincinnati which carrier proposes be shown to the Board with a referee present.

(2)

THE BOARD LACKS AUTHORITY TO DO WHAT IS HERE DEMANDED

Part 2 of the claim demands that the carrier be ordered to allow car inspectors employed in Gest Street Yard, Cincinnati, to display blue signals when riding on self-guided rubber-tired vehicles using the echometer to test freight car axle journals.

Section 3 First (i) of the Railway Labor Act restricts authority of the Board to deciding "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. * * *" In view of this limitation upon the Board's authority, it is evident that the Board lacks authority to order the carrier to do what is demanded in part 2 of the claim. In these circumstances, the Board should dismiss part 2 of the claim for lack of authority to do what is demanded.

CONCLUSION

Carrier has shown that:

(a) Refusal to permit car inspectors riding on self-guided rubber-tired vehicles using the echometer in testing freight car axle journals to display blue signals at each end of cut of cars on which car axle journals are being tested is not in violation of the current agreement. The ultrasonic testing of freight car axle journals does **not** constitute "inspecting or working on cars or trains" within the meaning of Rule 158.

(b) The Board lacks authority to do what is demanded in part 2.

The effective agreement not having been violated as alleged, the Board should so hold and deny part 1 of the claim. The Board, lacking authority to do what is demanded in part 2, should dismiss that part of the claim for lack of authority to do what is demanded.

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.

Involved here is the question whether Rule 158 is applicable to the submitted facts so as to require that blue flags be displayed by day and blue lights by night in the receiving yard of the subject Carrier while they are testing or inspecting freight car axle journals by use of a mechanical vehicle and device called the echometer.

It must be noted that the facts set forth in the respective submissions are somewhat disputed. The Carrier maintains that the operation here involved is limited and that the blue flag and blue light prescription of Rule 158 is observed except in these limited circumstances. Cars are switched to tracks 16, 17 and 18 of the East Yard and are there inspected if they have not been previously inspected. They are then tested by this echometer which is carried on a self propelled vehicle which travels between the tracks being self guided by side rails in these particular areas. The Carrier concedes that some inspection work is performed on Tracks 16, 17 and 18 and maintain that the required flags and lights are used when inspections are being carried on or work is thus being performed. They further maintain that the testing in the manner here described is not within the purview of the rule—that the words “inspected or worked on” involve the hazards of going between and under cars none of which hazards are present in the instant testing operation.

The employes maintain that this “testing” process constitutes “inspected or worked on” within the wording of Rule 158 and further claim danger to life and limb continues even when the work is restricted to use of the echometer because this operation necessitates mechanical contact with the equipment and this in turn demands close proximity to the cars by the operation thus creating danger of injury from possible movement of cars.

Ignoring momentarily the conflict in the facts the question arises: Is Rule 158 susceptible to an interpretation whereby the ultrasonic testing can be regarded as outside its scope? In Second Division Award 1764 the holding *per* Referee Carter was that the mere servicing of journal boxes does not constitute “inspected or worked.” The Board reasoned that the words were ambiguous and that the custom of not using blue flags and lights of standing was relevant in deciding the rules applicability. The organization’s failure to complain for thirty years was held to conclude it. The factor of long acquiescence is not shown to be indisputably present in this case. There is evidence indicating at least some period of acquiescence by the organization.

Taking the Carrier at its word that blue flags and blue lights are dispensed with only in the single circumstance where the cars are received on the three tracks for echometer testing and tagging of cars and that alone, we observe some logic in their position that blue flags and blue lights are not necessary. This is not “inspecting or maintaining” as it was understood in 1920 when the rule was first promulgated. Why the Carrier wishes to dispense with this small precautionary measure, is unclear, involving as it does little effort and expense as against the magnitude of injury if something were to happen but if they want to assume the responsibility there is nothing in the rule which prevents them from doing so, if as stated the work involved amounts to echometer testing only.

As a practical matter it is impossible to see continued hazard to the workman as long as he is riding between the tracks on the vehicle. It would appear from the representations of Carrier that all hazard is now eliminated.

On the basis of the facts stated and only to the extent here indicated the claim is denied.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Harry J. Sassaman
Executive Secretary**

Dated at Chicago, Illinois, this 20th day of September 1961.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3833

The majority condones the carrier's refusal to permit the instant claimants to use blue flags because "The Carrier maintains that the operation here involved is limited and that the blue flag and blue light proscription of Rule 158 is observed except in these limited circumstances." Following this reasoning to a logical conclusion the majority should have pointed out where Rule 158 permits any exception to the use of blue flags. Obviously the reason this was not done is because there is no exception.

The majority admits that not using blue flags in the present circumstances involves the likelihood of injury but finds that this is the responsibility of the carrier. Aside from the fact that the majority here is upholding the carrier in its flagrant disregard of the clear and precise meaning of Rule 158 little regard is shown for human life. This is diametrically opposed to the majority's finding in Award 3832 that "If even a possibility of injury exists the relatively insignificant precautionary measure is well worth the expense and effort which it requires." In the present instance the majority attempts to justify the erroneous findings for the reason that "it is impossible to see continued hazard to the workman as long as he is riding between the tracks on the vehicle" (echometer). Yet it is well known that one of the most dangerous spots on a railroad is between tracks on which trains are operating.

Suffice it is to say that the Board cannot make or amend a rule as it has attempted to do here by upholding the carrier in its evasion of Rule 158.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink