Award No. 4768
Docket No. 4604
2-SP(PL)-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier's instructions forbidding Car Inspectors in train yard at West Oakland, California to use blue flag and blue light is in violation of the current controlling agreement.

2. That the Carrier be ordered to rescind their instructions and issue instructions to use blue flag and blue light in compliance with the current working agreement.

EMPLOYES' STATEMENT OF FACTS: On September 5, 1962, Car Foreman Gerald E. Earl of the Southern Pacific Company (Pacific Lines) hereinafter referred to as carrier, issued instructions to Car Inspectors J. S. Dodig, R. N. Koski, D. D. Dyer and Fred Huffstutlar, regularly employed as such by carrier in its West Oakland train yard, West Oakland, Calif., not to use blue flags or blue lights in connection with inspecting and servicing journal boxes on inbound trains.

The instructions of Car Foreman Earl abrogated a practice established in accordance with the application of Rule 49(f) that had been in effect for in excess of twenty (20) years on this property, whereby blue flags and blue lights have been used for the protection of employes inspecting and servicing journal boxes in train yards, which fact is evidenced by statements of employes. All of said statements were furnished to carrier and made a part of the record of handling on the property as evidenced by copy of letter dated May 14, 1963 directed to Asst. Manager of Personnel, E. J. Nelson by General Chairman T. F. Hauder.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including carrier's highest designated officer, all of whom have declined to make satisfactory adjustment.

The agreement effective April 16, 1942, as subsequently amended is controlling.

In conference held February 20, 1963, petitioner's vice general chairman conceded that lifting lids, adding oil and adjusting waste was not hazardous but contended that adjusting lubricating pads required blue flag protection. That contention was based solely on the theoretical assumption that car inspectors come in contact with car or cars involved. Contrary to the contention that adjusting lubricating pads is hazardous, a standard packing iron is used on carrier's property to adjust lubricating pads to proper position in their respective journal boxes, which operation permits car inspector's person to remain free of car or cars at all times (see Carrier's Statement of Facts). In the conference held February 20, 1963, Rules 49(f) and 106 of the current agreement were fully reviewed. The former does not require blue flag protection for only visual inspection and reference in the latter to "* * * employes engaged (as) * * * car oilers and packers * * *," involves adjusting waste or pads in addition to the above work conceded to be not hazardous. (While the latter rule refers to carmen helpers, no dispute exists with respect to the fact that mechanics, as in this case, may perform any work of their craft.)

In addition to the above, methods employed by carrier to notify employes of change in Rule 26 (and others not involved herein) of the transportation department were also discussed in the above-mentioned conference. With respect thereto, employes concerned were notified personally and by Form S-2292 posted in the usual manner and which reads in part as follows:

> "For the Government and information of employes of various units of the Operating Department, attention is directed to the following from Rules and Regulations of the Transportation Department, effective July 1, 1960.
>
> * * * * *
>
> 26 (quoted supra)"

Employes involved — including claimants — were personally instructed as to the application of that rule, and were fully informed at various safety meetings on the property. As stated above, this rule revision was accepted and applied without protest and was only injected as an afterthought after the initial submission of the instant case. There has never been a single instance of reference to a safety hazard on the entire system as a result of the accepted application of Rule 26.

The position of the carrier with respect to safety is best exemplified by the many years it has been awarded recognition by the National Safety Council.

Carrier avers that it is equally interested with its employes in all safety matters, including blue flag protection, when required, and that this matter is under constant and continuing consideration by all concerned.

CONCLUSION

Carrier asserts the instant claim is entirely lacking in agreement or other support and requests that it be denied.

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 waived right of appearance at hearing thereon.

The carrier on September 5, 1962, ordered car inspectors to inspect and service journal boxes at West Oakland without blue flag or blue light protection. The claim is that this action violated Rule 49(f), which reads as follows:

> "(f) Trains or cars while being inspected or worked on by train yard employes, will be protected by blue flag by day and blue light by night, which will not be removed, except by the workmen placing same. (See Transportation Department Rule 26.)"

The claim was denied on the property upon the grounds that the work in question was not dangerous, and that such protection was not required for it by Rule 26.

There is considerable discussion of the effect of Rule 49(f)'s reference to the Transportation Department's Operating Rule 26; — whether the latter was thereby incorporated by reference as part of Rule 49(f); and whether thereafter the Carrier could unilaterally amend its operating Rule 26.

Whatever the effect of the reference, the parties' Agreement and the carrier's operating rules are separate and independent. The agreement may be amended only by mutual consent; but the carrier's operating rules are unilateral and may be unilaterally amended. If the effect of the reference was to incorporate Rule 26 as part of Rule 49(f), the incorporation necessarily was of Rule 26 as it then existed, and not as it might from time to time thereafter be unilaterally amended by the carrier.

But no such incorporation in an agreement by reference can be made without an express or clearly implied indication of the parties' mutual intent. Certainly the word "see" does not reasonably evidence any such intent; it is merely an explanatory or illustrative reference to the operating rule, and not an expressed or clearly implied adoption of it as part of the Agreement.

Moreover, nothing in Rule 26 in any way qualifies or limits the express provision of Rule 49(f) that "Trains or cars while being inspected or worked on by train yard employes, will be protected by blue flag," etc.

The carrier makes objection to the employes' signed statements that prior to September 5, 1962, blue flag protection during the inspection and servicing of journal boxes had long been made at West Oakland and elsewhere on the system. But the statements were submitted during the handling on the property, and they are not objectionable because not being made during the first step there.

However, in view of the plain and unambiguous wording of Rule 49(f), we have no occasion to consider established practice. By Rule 49(f) the parties agreed without qualification, limitation or exception that inspection and work-

ing on cars by these employes would be given blue flag and blue light protection; and that agreement can be changed only by negotiation. Claim 1 must therefore be sustained. Claim 2, that the carrier be given certain instructions, is not within this Board's authority; but the carrier should of course comply with the rules until or unless modified or revoked by the parties or waived by the organization.

AWARD

Claim 1 sustained.

Claim 2 disposed of as per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1965.

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