

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
and Canada  
{ Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the current Agreement of September 1, 1949, as subsequently amended, particularly Rule Nos. 16, 18 and 34, including the December 17, 1941 Vacation Agreement, as subsequently amended for failure to compensate Carman H. R. Walters the Supervisor's rate of pay when filling Supervisor's positions and/or vacancies.
2. That because of such violation and capricious action, the Norfolk and Western Railway Company be ordered to compensate Carman H. R. Walters, the difference between the Carman's rate of pay and the supervisor's rate of pay for two hundred fifty-eight (258) hours.

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.

Claimant contends that Carrier violated Rules 16, 18 and 34 of the controlling Agreement and Article 10(a) of the December 17, 1941 Vacation Agreement, when it used him on various occasions to fill supervisory positions. He avers that he worked a total of 248 hours performing work and filling a supervisor's position during the later part of 1979 and was not considered for a permanent position at Winston-Salem, when he filled and assumed the duties of a supervisor at that location. He asserts that he performed these supervisory duties at the Carman's rate of pay and was responsible for seeing the carmen performed their duties.

Carrier contends that he was consistently paid the Gang Leader's rate in accordance with Rule 44, when he filled in for a supervisor and asserts that Rule 44 plainly provides that mechanics may be appointed to hourly rated gang leader positions and assigned to work as supervisors under the direction of foremen. It avers that he accepted this procedure for many years without complaint or reservation and thus manifested a long term acquiescence that was consistent

with this rule. It argues that Rule 16 is inapplicable to this situation since it does not apply to foreman's position and asserts that no evidence was provided which would show that Claimant was not given any consideration for promotion to foreman. It further argues that Claimant's assertion that Rule 34 was violated is new argument, without judicial standing since it was not raised on the property.

In our review of this case, we agree with Carrier that Claimant belatedly cited a Rule 34 violation and thus, it is improperly before us at this time. We find no direct or inferential evidence that it was raised or discussed on the property and it cannot be considered at this level of the appellate process. (See Circular No. 1, National Railroad Adjustment Board). It is new argument.

As to the substantive merits of this dispute, we must concur with Carrier's position. While Rule 16 relates to the filling of vacancies and the concomitant requirement that employes filling a higher compensatory position must be paid the higher rate and Rule 18 requires that mechanics in service will be considered for promotion to positions of foreman, Rule 44 permits the payment of six (6) cents per hour differential to hourly rated Gang Leaders assigned to work as supervisors. The record shows that Claimant had been paid the Gang Leaders' rate for the many years when he filled in for a supervisor without objection or complaint, consistent with Rule 44, and provides no indication that his use during the claim period was any different. Under the Doctrine of Equitable Estoppel, which we find applicable here, a person may be precluded by his silence from asserting a right, when his total course of conduct indicates an explicit long term acceptance of another arrangement. Claimant worked as a Gang Leader under the direction of a foreman for many years, which was permissible under Rule 44 and was properly paid the six (6) cents per hour differential. (For authorities on the Doctrine of Equitable Estoppel see Third Division Awards Nos. 15827, 17250, 23478). From these facts, it would be difficult for us to conclude that the Agreement was violated. We find no evidence that he was not considered for promotion or any concrete evidence that Article 10(a) of the December 17, 1941 Vacation Agreement was violated. Claimant's consistent acquiescence to Rule 44's applicability is pointedly dispositive of this claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 20th day of April, 1983.