**NATIONAL RAILROAD ADJUSTMENT BOARD**
**SECOND DIVISION**

Form 1

Award No. 12781
Docket No. 12645
94-2-92-2-192

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

**PARTIES TO DISPUTE:** (Brotherhood of Railway Carmen Division/
(Transportation Communications
( International Union
(
(Southern Pacific Transportation Company

**STATEMENT OF CLAIM:**

"1. That the Southern Pacific Transportation Company (Eastern Lines) violated the controlling Agreement, particularly Rule 28, and the Agreement of August 13, 1982, when they arbitrarily denied furloughed Carman O.S. Rodriguez the right to displace temporarily promoted carman apprentice at San Antonio, Texas.

2. That accordingly, the Southern Pacific Transportation Company (Eastern Lines) be ordered to make whole Carman O.S. Rodriguez for seniority rights, vacation rights, monetary losses, health-welfare benefits, and all other benefits that are a condition of unimpaired employment commencing January 3, 1992."

**FINDINGS:**

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 Claimant was furloughed in January of 1982, at which time he was a qualified Journeyman Carman and his seniority date and title continued to be included in subsequent seniority rosters issued by the Carrier. During his period of furlough, the Claimant was employed by the United States Postal Service in California. Nine years after the furlough, the Claimant asserts that he became aware that the Carrier had carman employment in San Antonio, Texas. He returned to that city and gave notice to the Carrier officer of a desire to displace a "set-up" carman at that point. The request was denied.

The Organization denies that there is a time limit for a furloughed employee to make a written notice of displacement during the period of his furlough.

The applicable Agreement language between the parties states:

> "In the event qualified journeymen carmen become available within the Southern Pacific Transportation Company (Eastern Lines) workforce due to furlough of employees, the senior furloughed employee, upon written notice to the appropriate Superintendent or Plant Manager, seven (7) days prior, may displace the junior temporarily promoted mechanic at that seniority point..."

The documents of record, as exchanged while the dispute was under consideration on the property, show that, on December 20, 1991, the San Antonio Terminal Superintendent was notified of a desire to displace. And, on February 20, 1992, a claim was submitted asserting that the Claimant was denied the right to displace a temporarily promoted carman apprentice.

On March 13, 1992, the Carrier conceded that the Letter of Agreement permits a qualified journeyman carman to displace a temporarily promoted mechanic on the Eastern Lines but:

> "...it is not the intention of the Agreement to allow a furloughed carman to wait in excess of nine years before he decides to place a bump on a temporarily promoted mechanic.

> There have been many temporarily promoted mechanics on the Eastern Lines in the past several years, even in San Antonio; however [Claimant] chose to go on furlough status and move from Austin, Texas to Oxnard, California to work for the U.S. Postal Service."

The cited denial letter states that the Claimant was told that there were no openings at the time but that he would be considered if there was an opening in the future. In fact, according to the Carrier, the Claimant was hired on January 15, 1992, as a journeyman carman.

In response, the Organization denied that the nine year lapse was pertinent, that the Claimant was furloughed through no fault of his own; the Company never attempted to provide him with employment as a carman at any other position, nor was he ever furnished with information or correspondence concerning job openings. In its submission to this Board, the Carrier reiterates that: "It was not the intent of the Agreement to allow a furloughed carman to wait in excess of nine years before deciding to return to work. The intent of the Agreement was to require a qualified carman who is furloughed to notify the Company at the time he is furloughed or soon thereafter of his desire to displace...", and the Claimant could have displaced several temporarily promoted apprentices on the Eastern Lines in the past nine years. Thus, according to the doctrine of "Laches", the current claim is barred.

The Carrier also relies upon the doctrine of "equitable estoppel", since the Claimant deliberately slept on his rights in this dispute.

On the property, the parties discussed Second Division Award 11573, concerning these same parties. In that dispute, the employee had been furloughed and, in August of 1985, a position was offered to the Claimant at Lafayette, which was refused, but in May of 1986, the Claimant requested the displacement of the carman apprentice who had been hired for the Lafayette Yard position. The request was denied on the grounds that the Claimant had "...previously turned down the position and that it was no longer open". In that dispute, the Referee found no evidence of any Carrier argument, other than the prior refusal, which argument was rejected by the Board, since there is nothing in the Agreement that states that Claimant's failure to accept a job in August relinquished a right to the job.

In this dispute, the Carrier has only relied upon an asserted intention of the parties when the language was negotiated. In its submission, the Carrier has raised the questions of "Laches" and "estoppel". We do not find that those doctrines, even if properly before us, control this case. The Agreement language relied upon may not be a model of clarity but, nonetheless, we find nothing of record to indicate any time limitation. To be sure, it is somewhat curious that a claim be sustained when there has been a nine-year hiatus. But, to permit the length of absence to control the outcome of this case would be tantamount to our rewriting the Agreement, which we may not do.

Based upon all of the evidence of record, and with specific reference to the cited award, we are inclined to sustain the claim, even though it is for a relatively short period of time. Our attention has also been invited to Second Division Award No. 12511. We find nothing in that sustaining Award which is in conflict with our conclusion in this case.

## A W A R D

Claim sustained.

## O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmarked date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of 2nd Division

Dated at Chicago, Illinois this 17 day of November, 1994.