Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13504
Docket No. 13339
00-2-98-2-24

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

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Incorporated

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Grand Trunk Western Railroad Company/CN violated the terms and conditions of the current Agreement on January 23, 1997 when they failed to list Carman R. J. Thompson, Social Security No. 362-66-6618, on the 1997 Lansing Car Department Carmen Seniority Roster-Lansing, MI–dated January 23, 1997 after Carman Thompson had worked at Lansing, MI on September 17 and 18, 1996 as a Carman, thus, having established seniority at Lansing, MI on September 17, 1996.

2. That accordingly, the Grand Trunk Western Railroad Company/CN now be ordered to provide the following relief: That Carman R. J. Thompson be listed on the 1997 Lansing Car Department Carmen Seniority Roster in the appropriate slot with a seniority date of September 17, 1996."

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 were given due notice of hearing thereon.

On March 12, 1997, the Local Chairman filed this claim protesting the omission of the Claimant's name from the 1997 Carmens' Seniority Roster for the Lansing Car Department despite the fact that he had worked there as a Carman position on September 17 and 18, 1996, thereby establishing seniority at the point. Thus, the Organization contends, the Carrier's posting of the roster without including his name violated Rule 26 of the Agreement. The applicable language of that Rule states, in part:

> "If application is not disapproved within ninety (90) days of commencement of service, employee's name will be placed on the seniority roster of regular employees with a seniority date as of the first day of service . . . ."

The facts giving rise to this dispute are somewhat unusual. The Claimant, a journeyman Carman at the time of claim, had been in furlough status at Battle Creek, Michigan since some unspecified date in 1995. On September 9, 1996, more than a year later, he wrote District Mechanical Supervisor I. M. Turk requesting to displace an Apprentice on temporary upgrade at Lansing, Michigan. Turk obtained approval for the move from District Superintendent C. E. Hamilton and then scheduled a physical and drug screen for the Claimant. Upon their successful completion, Lansing Foreman Wayne Yeates wrote to temporary Carman R. L. Clark on September 16 advising him that he had been displaced by a "permanent carman" effective at 6:00 A.M. on September 17, 1996. Clark, being unable to exercise his seniority elsewhere, reverted to furlough status.

General Chairman Larry G. Thornton, contended that Thompson had no right to displace because over five days had elapsed since his furlough. On September 17, he faxed a letter to the Carrier's top operations officer, Tony A. Rossi, advising him of "the latest episode of mismanagement of the carmen;" threatening to file pay claims on behalf of Clark; and roundly traducing District Superintendent Hamilton.

Apparently sensing the feeder bands of the hurricane, on September 17 the Carrier reviewed the transaction, reversed course and wrote Thompson advising him

that "it has been determined that your 'bump'. . . was allowed in error. Therefore I have been instructed to return you to furloughed status. . . ." In consequence, Thompson was off the job at the end of his shift on September 18 and Clark was reinstated to the position on September 19.

According to the Carrier, D. A. Hicks, the Organization's Local Chairman at Battle Creek, interpreted the Agreement differently. As a result, on October 7, 1996, General Chairman Thornton wrote directly to District Superintendent Hamilton informing him that the Organization had changed its position on the issue.

> ". . . [C]oncerning the action taken to put back . . . Clark at the Lansing Facility . . . I was directed to take that action by a Grand Lodge Officer . . . After meting with top BRCA officers this past week . . . I have been informed that Thompson does have a bump coming. So the situation has reversed at the Grand Lodge. I am now stating to you, the Grand Lodge has directed me to approach the Carrier, insisting [that] Thompson be put to work in Lansing. This I expect to happen expeditiously." [1]

When the Carrier published its Carmen Seniority Roster on January 23, 1997 with Thompson's name missing, this claim was submitted.

The Organization asks the Board to find that if there were any understanding between the Carrier and the Organization at the local level to return Clark to work after being bumped, it was non-binding and unenforceable because it incorrectly interpreted—indeed, changed--the Agreement, something neither of the parties involved

[1] In the same communication, General Chairman Thornton argued that Claimant, who held seniority at Battle Creek, should also now be allowed to work there in view of the merger of previously separate Car and Locomotive Department seniority lists at the location. That assertion was predicated upon a Letter of Agreement dated November 14, 1983 between the parties outlining their understanding with respect to the sequence "Protected Carmen" would follow in filling vacancies not requiring a change in residence. The record reflects that on October 21, 1996, Local Chairman Hicks submitted a grievance on behalf of Thompson asking that he be returned to work at Battle Creek under this Agreement. The claim maintained that Carrier's employment of Carmen from the Port Huron Extra Board in lieu of Thompson violated the Agreement. Local Chairman Hicks' claim on this question apparently was never prosecuted and is not before the Board.

had authority to do.[2] Rule 26 of the Agreement plainly allowed Thompson to displace because it contains no time limits on such an exercise. Section 5 of Addendum No. 8, effective January 1, 1942 provides that "[w]hen qualified mechanics become available, they will be permitted to displace those temporarily promoted under this agreement." No time limitations are specified. Nor do the terms of a subsequent Rule revision, Addendum 12 effective September 23, 1981, limit the time within which bumps may occur. That Rule simply prohibits bumping "except when forces are reduced or jobs are abolished." In sum, what the Board must rule on here is whether the Rules do or do not contain a time limit for bumping.

The Carrier resists the claim on several grounds. It argues first that Thompson's two days at Lansing were the result of ministerial error, rectified by agreement of the parties after the Organization pointed out that he should not have been allowed to bump.[3] Thus there is no dispute to adjudicate here because the parties settled the issue on the property. The debate is over. Even if common sense and stable labor relations did not so require, the Railway Labor Act itself orders that both sides staff their operations with representatives "designated and authorized to confer . . . ." Generations of respected neutrals have held in analogous situations that when the parties conclude settlements they must honor them. The Board has no right to allow the parties to abandon their commitments and reopen settled cases just because one party to the deal experiences buyer's remorse.

On the merits, the Carrier urges that the Organization failed to carry its burden of proof. It made no showing that this displacement long after Thompson's furlough was consistent with past application of the Agreement. In fact, for 50 years, it argues, the Agreement had been administered to require employees to exercise their seniority at the time of their furlough, not a year later. The Carrier contends that any issue of Thompson's right to bump had been conclusively settled, and settled in conformity with

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[2] The Organization also argued that Carrier failed to document the existence of an Agreement with General Chairman Thornton to nullify Thompson's bump. The fact of the Carrier's accession to the Organization's initial demands is evident throughout this record. The Board concludes that an agreement was reached at the local level to remove Thompson and thus avoid a claim or claims.

[3] Although it is not clear whether it is relevant, or even fact, the record alludes to the absence of a Carrier official during this period who normally would be involved with such displacements.

the Agreement as recognized by the Organization's initial interpretation. Addendum No. 8 has no application to this dispute: The Claimant was not a "qualified Carman"—he was a journeyman attempting to bump a temporary upgrade. Nor does the parties' September 23, 1981 Agreement, Addendum No. 12 ROLLING OR BUMPING, apply here. It forbids bumping except when forces are reduced. There was no force reduction in this instance—and hence Thompson had no right to bump. In sum, the parties settled the case. That settlement was within the limits of their authority. The settlement correctly applied the Agreement to the facts. It should be enforced.

We carefully reviewed the parties' positions and find that the Carrier's views are somewhat closer to those of the Board. The Organization wants its conduct in forcing a resolution of Thompson's initial move disregarded. The Rules, it says, are clear and unambiguous. They must be examined. If the Board simply construes the Agreement, it will conclude that the position was correct. The Carrier says you never get there; General Chairman Thornton's settlement of the initial dispute erects a baffle to the merits; it estops the Organization from now arguing a contrary position. But even if the merits are considered, it maintains, the Board must find that the Rules clearly prohibited the attempted bump.

As we view this dispute, the question of whether Thompson's name should be restored to the Lansing Seniority Roster turns in crucial respects on whether General Chairman Thornton and Rossi acted within the scope of their authority in agreeing to negate his bump. The Board concludes that there is undoubtedly some foundation in the Agreement for the current position of the Organization. There are, for example, insofar as this record shows, no express time limits for bumping in Rule 26 or in Addenda Nos. 8 or 12. Thus, the Organization's current position is hardly frivolous. On the other hand, the Carrier argues that Rule 26 has been consistently applied to require displacement within five days, and that contention has not been addressed by the Organization. Nor has the Organization spoken to the Carrier's argument that Addendum No. 8 does not apply to journeymen, or Addendum No. 12 to year-old furloughs. In short, if the Organization's current position is plausible, so too was its initial position. The contract interpretation question is a close one.[4] Overturning the decision of a General Chairman and a Carrier representative is a serious undertaking;

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[4] Notwithstanding its argument here that the Rules are clear, General Chairman Thornton conceded in his on-property efforts to reinstate Thompson that "ambiguity was present."

it poses the threat of undermining the fundamental authority of the Organization. Without deciding the point, the Board concludes that under the circumstances, General Chairman Thornton and the Carrier's top operations officer, Tony A. Rossi were clearly empowered by virtue of their offices to come to a mutual understanding on how the Rules should apply to Thompson, as urged by Battle Creek Local Chairman, D. A. Hicks, without "changing" the Agreement.

It is a familiar rule that an estoppel arises when one party by his actions—or his silence-intentionally induces another to believe one thing, and the other party acts to change his position in reliance on that belief. Principles of estoppel, equitable estoppel, detrimental reliance, waiver, acquiescence—often interchanged depending on linguistic convenience and frequently without much concern for technical legal distinction--are commonly relied upon in the context of cases such as the instant one. As Elkouri explains, "where one party, with actual or constructive knowledge of its rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that the conduct is fully concurred in, the matter will be treated as closed . . . ."[5]

Those principles were directly implicated in First Division Award 23025. (After the Claimant and his Organization accepted reinstatement conditioned on certain terms, the Board concluded the Organization was estopped from challenging the Carrier's subsequent dismissal action.) In Third Division Award 31224, a case strongly suggestive of the instant circumstances, the Board was confronted by a challenge to an employee reassignment made at the request of the General Chairman. Upon evaluating the claim, it invoked estoppel and held that because the move "was done as a favor to the General Chairman, the Organization really has no basis to complain . . . ." Third Division Award 27664 also presented an analogous fact pattern. There, after the Carrier's subcontracting with a tree service to cut brush was protested by the Organization unless one of its members accompanied the contractor, the Carrier acceded to the request. When a claim was submitted contending that the contractor's services violated the Agreement, the Board concluded that (1) even if the Local Chairman had no authority to modify the Agreement, his actions were more in the nature of settling a potential claim (2) such action was represented as being within his authority (3) it was relied on by the Carrier and (4) accordingly the Organization could not complain.

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[5] Elkouri & Elkouri, How Arbitration Works, BNA (5th ed. 1997) at 577.

The Organization here received the benefit it sought when it jumped two levels over the Labor Relations representative who normally dealt with such issues and went directly to the Carrier's chief operations official for relief. The Carrier performed the very act demanded by the Organization. Thus, it views this claim with a baleful eye. The Board does as well.

What is clear is that the parties were dealing with terms that are open to debate when applied to the Claimant's facts. The parties acted in good faith in agreeing on how the Rules should apply to Thompson and, consistent with substantial prior authority, the Board is not inclined to poke around in the merits of the deal they struck.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 17th day of April, 2000.