

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22700
Docket Number CL-22571

William M. Edgett, Referee

PARTIES TO DISFWTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight **Handlers**,
(Express and Station **Employees**
(
(Maine Central Railroad Company
(Portland Terminal Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(GL-8598) that:

1. Carrier violated the Agreement between the parties when on November 18, 1976, it required and permitted junior **employee** to cover **one** (1) day vacancy at time and one-half rate on the 11 PM to 7 **AM** yard clerk position at Bangor, Maine.

2. Carrier shall be required to pay C. T. Carson, Clerk, Bangor, Maine, the senior **employee** entitled to the work, eight (8) hours' pay at time and one-half rate for November 18, 1976.

OPINION OF BOARD: There existed on this property a negotiated Agreement which provided a procedure to be followed by the parties when filling vacancies of less than thirty (30) days duration on regular **assignments**. This **Agreement** had been in existence for **more** than **twelve** (12) years when the instant controversy arose.

On **the** data **in** question claimant, who was regularly assigned **on** first shift at Carrier's Bangor, Maine, Freight Office, alleged that **he** should have been used to fill a one day vacancy on a third shift yard clerk **assignment** instead of the junior **employee** who was used.

Carrier defends denial of this claim on the basis that the practice at **Bangor, Maine** had been, in the absence of available qualified spare board **employees**, to use **employees** regularly assigned **at** the freight office to fill vacancies at the freight office and to use employees regularly assigned at the yard area to fill vacancies in the yard.

From the record it is apparent that this method of filling vacancies has been employed in the past with the apparent acquiescence of the organization. We find in the record evidence of a written **understanding**

which post dates this claim discontinuing the separate areas and thereafter such vacancies were filled by regularly assigned **employees in** seniority order from the entire district absent an available qualified spare board **employee.**

While it is generally accepted that where there is a clear and unambiguous rule or agreement, practice cannot **be a** determinative factor; **in** this case not only was Carrier not the beneficiary of the separated area method of filling vacancies, **but** also the organization obviously acquiesced in the arrangement and accepted the fruits thereof in silence **and** without objection. As this **Division** said in Award No. 15827 (Ives):

"* * * Acquiescence is conduct from which **may** be inferred assent. Under **the** doctrine of equitable **estoppel a person** my (sic) be precluded by his silence, when it was his duty to speak, from asserting a right which he otherwise would **have** had. * * *."

See also Third Division Award Nos. 22081, 22148 and 22213.

Therefore, the **application which** the parties themselves have placed on the Agreement **in** question furnishes a controlling guide as to their intent and desires. We adhere to **that** self imposed application and find no basis for an **affirmative** award.

FINDINGS: The **Third** Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the **parties** waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are **respectively** Carrier and **Employees** within the meaning of the **Railway** Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1980.