NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23174

THIRD DIVISION Docket Number TD-22621

John J. Mangan, Referee

PAKCIES TO DISPUTE: (American Train Dispatchers Association
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

System Docket No. CR-8. Case No. 7-2 - Claimant B. L. Summerson

(a) Please allow 8 hours at time and one half rate on the following days listed below account working first trick Section D when I should have been working second trick Section C:

2-6-77 2-13-77 2-20-77 2-27-77

(b) Please allow 8 hours at time and one half rate on the following days listed below account working second trick Section D when I should have been working third trick Section C:

2-a-77 2-15-77 2-22-77 3 -1-77

(c) Please allow 8 hours at time and one half rate on the following days listed below account working third trick Section D when I should have been on my rest day:

2-2-77 2 -9-77 2-16-77 2-23-77

(d) Please allow 8 hours at pro rata rate on the following days listed below account not working when I should have been working first trick Section C:

2-4-77 2-11-77 2-18-77 2-25-77

OPINION OF BOARD: As a result of certain railroad mergers involving the Carrier in this dispute, it was decided that various rearrangements of train dispatching territories would be required and that Desk "C", one of the territories involved, would be abolished in the Altoona, Pa. office.

The Carrier notified the Organization in a notice, dated October 22, 1976, of its proposed plan to abolish that office. Subsequent to that notice, the Carrier addressed a second notice, under date of October 26, 1976, to the Organization. It referred to the contents of the letter, dated October 22, 1976, and also stated that it proposed to put the plan into effect commencing December 15, 1976 and suggested a meeting for November 3, 1976 at 11 A.M. at the Pittsburgh Office to discuss the work equities.

A meeting was held on November 3, 1976, at which time the rearrangements of the Dispatching Desks were discussed. Also discussed was the possibility that Desk "D" may be overworked. A thirty-day trial period was discussed and a re-evaluation was to be made after that time.

On December 3, 1976, a notice was sent to all Train Dispatchers advising them that on January 3, 1977, the territory handled on the "C" Desk would be transferred to the "D" Desk. No written agreement was entered into pertaining to the manner in which seniority of Train Dispatchers affected by the abolishment of Desk "C" was to be adjusted.

Under notice, dated January 21, 1977, the Division Superintendent sent a notice to the Claimant which stated that, effective January 21, 1977, the remaining territory handled on the "C" Dispatcher Desk will be transferred to the "D" Dispatcher Desk and that on January 24th, his position on "C" Desk will be abolished. It was suggested that he exercise seniority as provided by the Regulations.

The Carrier finalized such arrangements on or about January 24, 1977 when it abolished Desk "C" and transferred the work of that desk to the "D" Dispatching Desk. The Claimant was displaced from Desk "C" and transferred to Desk "D". The General Chairman informed the division Superintendent on January 24, 1977 that by abolishing Train Dispatching Desk "C" and adding part of the territory to Train Dispatching Desk "D", that it was in violation of Regulation 3-G-1 of the P.R.R. Schedule Agreement. The Claimant, thereafter, filed this claim under Regulation 3-G-l of the Agreement between the parties upon the ground that the Organization had not agreed to the proposed changes in writing.

The Carrier opposed the claim and urged that it should be dismissed for want of jurisdiction. It asserted that the provisions of Regulation 3-G-1, under which this claim was filed, had been superseded by the provisions of Section 503 of the Regional Rail Reorganization Act of 1973.

Section 3-G-l is material to this case and is quoted:

> "When seniority or dispatching districts or parts thereof are merged or separated, not less than thirty (30) days' advance notice thereof will be given, in writing, by the Manager of Labor Relations to the General Chairman, and the manner in which the seniority of Train Dispatchers affected is to be exercised shall be adjusted by agreement, in writing, between the General Chairman and the Manager of Labor Relations."

The Carrier is not persuasive in asking for dismissal of the instant case on the jurisdiction basis it is urging. This Board may adjudicate the dispute upon the language contained in the Agreement by interpreting and/or applying the Agreement as written in accordance with the provisions of the Railway Labor Act. We find, therefore, that the Carrier's defense that this Board does not have jurisdiction of the subject matter of this dispute has no merit.

The Carrier also asserted that, if Regulation 3-G-l did cover this dispute, that it had complied with that section; that proper notice was given to the Organization of the proposed changes; that it had meetings with the Organization and reached a meeting of the minds; that the General Chairman did not acknowledge, in writing, the notice sent to him, nor did he signify any disagreement with the terms of the understanding; that the Organization's representatives, apparently, did nothing to oppose the proposed changes and said nothing when it was their duty to speak out; instead they ostensibly concurred in the arrangements to be made; that the only inference that could be drawn by the Carrier was that the Organization acquiesced in the action to be taken by the Carrier; that the Organization is, therefore, estopped from contesting the action taken. No evidence was submitted to indicate that the Carrier had suffered any irreparable damage,

The Organization avers that Regulation 3-C-l applies when either seniority or dispatching districts are involved and that thirty days' notice must be given when seniority or dispatching districts are involved; that there had been discussions about the abolishment of Desk "C", but that no agreement had ever been reached as required by 3-C-l; that the Organization cannot be estopped from proceeding with this claim, because the first notice that it received that actual steps were to be taken concerning the disposition of the remainder of Desk "C" dispatching territory was in the notice sent to Claimant on January 21, 1977, advising him of the abolishing of Desk "C"; that the Organization immediately responded to such notice on January 24, 1977; that its action was timely, therefore, cannot be charged with abstaining from taking action or acquiescing in the Carrier's action. The Organization argued further that in view thereof, the claim should be sustained.

Upon considering all facets of the present claim, we find that the word "or" in the Agreement is the deciding factor, so that when either the seniority or dispatching districts are involved thirty (30) days written notice must be given.

The first written notice that the Carrier was finally going to dispose of the remaining territory on Desk "C" was set forth in the above mentioned notice of January 21, 1977. The Organization timely answered the Carrier in its letter of January 24, 1977.

There was no meeting of the parties or any agreement in writing reached between them as to the disposition of the remaining territory on Desk "C" as required by Regulation 3-C-l.

We can only conclude that the Agreement has been violated. (See Award 11068)

We now turn our attention to that part of the claim which requests compensation.

The Organization, on Record page 12, points out the basis for the claims entered and explains that no additional compensation is requested for days when the Claimant worked the same trick on the same day of the week after the improper abolishment of his position,

and the amount payable under this claim when the time and one-half rate was claimed is the difference between the pro rata or straight time rate received and the time and one-half rate now being claimed.

Section 7-B-l of the Agreement states:

> "Any adjustment growing out of claims covered by this Regulation (7-B-l) shall not exceed in amount the difference between the amount actually paid the claimant by the Company, and the amount he would have been paid by the Company, if he had been properly dealt with under this Agreement."

It is, therefore, the ruling of the Board that the claim is sustained as provided in 7-B-l of the Agreement.

The Organization submitted a notice to this Board, dated March 17, 1979, which it had received from the Carrier. The Carrier objected to the admission of the notice into the Record of the dispute on the ground that it had not been submitted on the property. The argument of the Carrier is most persuasive. We find., therefore, no consideration may be given to the said notice because it had not been submitted on the property.

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

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

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1981.

CARRIER MEMBER'S DISSENT
TO
AWARDS 23174 A 23175, DOCKETS TD-22621 & TD-22622
(REFEREE MANGAN)

On the date the foregoing awards were adopted, the Division adopted dismissal Award 23193 *(Sickles)* in an identical case which rejected the Organization's position dealing with this Board's jurisdiction. There we said:

> "Because the Carrier has raised the 503 defense on the property, it suggests that the dispute is not properly before this Division because of Section 507 of Title V. That section asserts that any dispute or controversy with respect to the interpretation, application or enforcement of the provisions of Title V (with certain exceptions not here applicable) may be submitted by either party to an Adjustment Board for final and binding decision thereon, as provided in Section 3 Second of the Railway Iabor Act.
>
> "A Special Board of Adjustment has been established pursuant to an agreement between the Carrier and the Organizations (including ATDA), which Board is designated as Special Board of Adjustment 880. Thus, the Third Division lacks jurisdiction over this claim, and it must be dismissed for want of jurisdiction.
>
> "In response, in the reply to Carrier Ex Parte Submission, the Organization states that this Board has jurisdictionbecause the claim is based on the agreement, not the R.R.R. Act. Further, in its Brief to this Board, the Organiration repeats various portions of the Railway Labor Act, and urges that we have jurisdiction to resolve, and to interpret or apply agreements.
>
> "While we do not propose to issue an all-inclusive Award dealing with all aspects of jurisdiction, nonetheless we are inclined to agree with Carrier in this particular case. Although, concededly, the Employes have submitted a claim based upon certain agreement language, nonetheless, the October 22, 1976 notification by the Carrier was specific in its statement that its action was being taken in accordance with Section 503 of the R.R.R. Act, which appears to grant to Carrier certain assignment, relocation, etc., rights. Thus, it appears obvious that in this dispute, the central issue revolves around the rights which may have been granted

to the Carrier by that Act; and it is an over-simplification to merely state that the claim is based on agreement language.

"Were we to issue an Award based on certain language of the agreement, that would not dispose of the case, because the record is specifically clear that Section 503 of the Act was raised in a timely manner on the property, and thus, a full exploration of the rights of the parties can only be achieved after a Section 503 adjudication is made. Yet, Section 507 precludes us from making such a determination, because it says any dispute or controversy concerning enforcement of the provisions of the Title (again, with certain exceptions not applicable) may be submitted by either party to an Adjustment Board for final and binding decision.

"As was noted above, Special Board 880 was created for just that purpose.

"We do not find it necessary to cite the numerous Awards of this Division which have held that we are without jurisdiction to issue awards when exclusive jurisdiction to resolve disputes under certain circumstances has been granted to *other* forums. However, we do invite attention to Award 21706 and 20289. Accordingly, we will dismiss the claim for lack of jurisdiction."

It is apparent these claims should have been dismissed without further consideration on their merits.

Even assuming arguendo, the Board could have properly considered the disputes on their Merits, the claims should have been denied. The Majority makes a statement which appears to be the major underpinning for its conclusion that no agreement was reached between the parties in this case. That statement follows:

"The first written notice that the Carrier was finally going to dispose of the remaining territory on Desk "C" was set forth in the above mentioned notice of January 21, 1977 The Organization timely answered the Carrier in its letter of January 24, 1977.

The fallacy of this contention is proven by the record and in particular the Organization's Exhibit TD-6 which was dated December 3, 1976, addressed to all Train Dispatchers and read as follows:

"Train Dispatchers
"On or about January 3, 1977, due to the dispatching of the Corning Secondary being reassinged to the Atlantic Region, the following remaining territory handled on the "C" Desk will be transferred to the "D" Desk:

"Rsrrisburg-Buffalo Main Line - Parwell to Molly
"Watsontown Secondary
"Elmira Secondary
"Williamsport Branch and Secondary
"Corning Secondary - CPAD to SR
"Avis Branch

"The Catawissa Branch between Newberry Jet, and Montgomery will be added to "D" Desk.

R. E. Werremeyer

cc: W. W. Mix
P. J. Kelly

It is noted a copy of this notice along with numerous other notices, was sent to the General Chairman, which he ignored. There was an abundance of evidence presented to the Board which clearly established that the General Chairman was advised as early as October 22, 1976, that Desk "C" was to be abolished. The letter of October 22, 1976, included the following paragraph (5):

"Three 7-day positions of train dispatcher in the Altoona office (Desk C) will be abolished."

There was a meting on November 3, 1976, which was attended by the various General Chairmen, including General Chairman W.W. Mix. The abolishment of all the positions of Desk "C" and the resultant transfer of the work formerly performed by the incumbents of those positions, was discussed in detail and resolved as indicated by the unchallenged evidence in the record. The Joint Submission contained a Joint Statement of Agreed Upon Pacts., which insofar as relevant read:

> "On November 3, 1976, the Carrier and the Organization met to discuss the equities involved concerning the proposed transfer of work. As a result of this meeting, the resultant adjustment of forces, as proposed on October 22, 1976, was agreed upon by both parties. However, only the effective date as previously proposed was objected to by the Organization because of the forthcoming holiday." (Emphasis Supplied)

There was no argument that the subjects of the discussion with the General Chairmen were the work eauities resulting from the contemplated changes. Moreover, the October 22, 1976 letter clearly stated in the concluding paragraph that the purpose of the meeting was "to discuss the work equities involved'!. The several letters, which Carrier then transmitted, each dealt with the discussions that took place on November 3, 1976, some of which dealt specifically with the precise issues presented by these claims. In reference to the transfer of work from Desk "C" with the resultant abolishment of the position, the Carrier called attention to the letter of December 10, 1976 which read:

> 94r.W. M. Mix, General Chairman
> American Train Dispatchers Association
> Box 353, RFE #3
> Hollyidaysburg, PA 16648
>
> "Dear Sir:
>
> "This will supplement our letter of October 22 in which we informed you that on or about January 3, 1977, Desk C in the Altoona Train Dispatching Office would be abolished.
>
> "At our conference in Pittsburgh on November 3, we discussed the reallocation of dispatching territories among the remaining desks in the Altoona Office and reached the followins understandins:

1) After the revision of territory on Desks B, D and E have been in effect for at least 30 calendar days, the A.T.D.A. wy, if it feels that one or more of such desks are overloaded, submit written request to this office that a joint study be made of such allegedly overloaded desks.

2) A joint study will be made by a representative of the Carrier and a representative of the A.T.D.A. of the desks in question to determine if an overloaded condition exists and what can be done to correct such condition.

3) If the A.T.D.A. is not satisfied with the results of the joint study, it may then directly invoke the services of the Joint Committee established under the National Agreement of 1937.

If our understanding are correctly stated would you please sign and return one copy of this letter.

Very truly yours,

/S/ J. R. Walsh

Senior Director-Labor Relations"
(Emphasis Supplied)

The General Chairman elected not to respond to this letter. The General Chairman's failure to respond was at his peril. In Award 22762 (Scheinman) decided February 29, 1980, the Board said:

"It is obvious, therefore, that the material presented to Carrier by petitioner on October 3, 1978 is properly a pert of this case. Carrier's election to ignore it - or at least not to respond thereto - was done at its own peril."

There is no question the subject of this letter coveredthe transfer of the dispatching work to Desk "D" as well as Desks "B" and "E" from Desk "C". It is interesting to note, there were no complaints from the incumbents of Desks "B" and "E". We can assume no such complaints

were registered because the incumbents were satisfied an understanding had been effected or that no Agreement was necessary as Carrier had repeatedly stated on the grounds that Rule 3-C-l was superseded by the terms of Section 503 and the 1975 Implementing Agreement.
See Third Division Awards 3813, (Douglas), 11331 (Coburn), 16448-16449 (Dugan); P.L. Board 214 (Dolnick); P. L. Board $04 -Award 46.

If the General Chairman had signed this letter, there would be little argument that the issues covered by Awards 23174 & 23175 were fully resolved by agreement. The Carrier stated categorically that the parties "reached the following understandings". (Emphasis Supplied).

In plain terms, there was an agreement dealing with the issues we had here, but after leaving the conference, the General Chairman refused to sign. It is important to note that he didn't reject the letter, nor did he disoute the terms of the understanding. By his inaction, he sought to exercise a veto right over the Carrier's freedom to make the changes which the Triple R Act granted.

The Board has considered this problem on many occasions and their attitude is fairly well summarized in Award 6066 (Wenke) (1953), where we said:

> "The next question is, did Carrier have the right to unilaterally transfer the clerical work of expensing waybills from Price to Salt Lake City, the clerical enployes of which are under a different District Seniority Roster?
>
> See Rule 5 of the parties' effective Agreement. It claims this right under Rule 21, which is as follows:
>
> 'When work of a seniority district and/or a number of seniority districts is withdrawn and established within another seniority district, under a centralized bureau or department,

> the rights of the employes directly and indirectly affected will be established by negotiation and agreement.'

Ordinarily Carrier may notunilaterally remove work from the confines of one seniority district and put it in another.

Rule 21 is a rule dealing specifically with the factual situation before us and is controlling over Rule 3 and 5 of the parties' Agreement, which are general in character. See Awards 4959, 4933, 5213 and 5220 of this Division. By the language used the rule does not restrict or limit the Carrier's right to handle the work as it thinks best but expressly recognizes that it nay withdraw work from cne seniority district and transfer it to another. The only condition it places upon Carrier's right to do so is that the rights of the employes directly and indirectly affected will be established by negotiation and agreement of the parties. See Award 4560 of the Third Division. This the Carrier sought to do but the Organization refused. Under such circumstances the Organization is not in position to complain that an agreement to that effect has not been entered into."

Award 7384 (Rader) follows this decision holding:

"Carrier supports its position on the theory that it proceeded under the provisions of Rule 21, which reads as follows:

> 'When work of a seniority district and/or a number of seniority districts is withdrawn and established within another seniority district, under a centralized bureau or department, the rights of the employes directly and indirectly affected will be established by negotiation and agreement.'

And by the refusal of the Organization to compose the differences between the parties by proceeding under the provision of Rule 21, thereby becoming in conflict of Award 6066 of this Division and citing from that Award the following:

> 'Rule 21 is a rule dealing specifically with the factual situation before us and is controlling over Rules 3 and 5 of the parties' Agreement, which are general in character.

> See Awards 4959, 4988, 5213 and 5220 of this Division. Ry the language used the rule does not restrict or limit the Carrier's right to handle the work as it thinks best but expressly recognizes that it may withdrew work from one seniority district and transfer it to another. The only condition it places upon Carrier's right to do so is that the rights of the employes directly and indirectly affected will be established by negotiation and agreement of the parties. * * *'

The Organization takes the position that there is a distinction between the situation considered in Award 6066 and the application of Rule 21 as the same applies to the instant case and points out and stresses that part of the Rule "Under a centralized bureau or department" and that the intent and purpose of this rule is clearly stated and it does not apply to a situation being considered here. Hence, that this rule has no application.

> We are of the opinion that when the Organization MS served with notice of Carrier's desire to negotiate under Rule 21, that it was incumbent upon the Organization to do so and its failure based on the theory that the Rule is not applicable, was notproper. It would seem that the Organization in this situation took an extremely narrow and technical view of the situation by its failure to negotiate and in view of this situation we feel that Carrier was within its right to proceed as it did. We fail to agree with Petitioner's contention that Rule 21 and Award 6066 should not have been considered by the Petitioner prior to its refusal to negotiate and in view of this these claims fail."

See Award 10807 (Moore) which states the wtter is now Res Judicata. In Award 13174 (Wolf) we again considered a similar problem and concluded:

> "There is no claim that adequate notice was not given. The issue is over the second condition which, if carefully read, has reference merely to the apportionment of emoloyes affected. No restriction is placed by the Rule upon the Carrier's right to consolidate the districts, but merely as to how the emploves NV be apportioned between them. This limited right does not prevent Carrier from effectuating the consolidation nordoes it give the Organization a veto over it.

It is inconceivable that, lacking an Agreement on apportionment, Carrier has no recourse but to yield to the conditions requested by the Organization. Rather it seems that the

Carrier has an obligation to seek Agreement in good faith and if it fails to reach an accord, to proceed under its general managerial prerogatives. The Organization's recourse, in such event, would be to grieve over the question of whether or not Carrier has carried out its obligation to seek Agreement in good faith and has properly apportioned the employes.

If we were to hold that the transfer could not be made, absent an Agreement on apportionment, one would wonder why the requirement was limited to apportionment. Why did the parties not say that Agreement must be obtained on all aspects of the consolidation, its extent, the operative dates, the methods of handling seniority, etc. It is obvious that the parties only intended a limited area in which Agreement must be sought, the apportionment of employes. A limited area must not be expanded beyond its limits. The tail curt not be permitted to wag the dog. If we are not to disregard this requirement as unenforceable our only recourse is to assume that the parties intended this Board to Judge which side was unreasonable in its failure to reach an Agreement. Under such a standard we must inevitably hold for the Carrier for the parties were in Agreement on apportionment. They were in disagreement over a matter unrelated to apportionment. We cannot hold that the Carrier was unreasonable in refusing to yield to every condition asked by the Organization when it has agreed on all but one and as to that one, the Organization has another recourse, to proceed under Section 6 of the Railway Labor Act.

The Organization held up the Agreement in order to force from the Carrier concessions which the Carrier was under no obligation to grant. In effect; it sought to expand the Agreement without resorting to the usual method of seeking amendments. While the Carrier may choose to grant such concessions it is under no obligation to do so, and its refusal cannot, therefore be deemed unreasonable." (Emphasis Supplied)

In Award 18397 (Criswell) the matter was decided as follows:

"Carrier wrote the General Chairman of its intention, then, through representatives of the designated officer, conferred with the Organization. The result of this conference was the General Chairman's response that he would reconsider.

The General Chairman did not reply, and within five days he was called and written. Again he did not reply and the work was started 10 days after the conference.

The demand for PO quick a decision and the restrictive time limits placed upon the Organization's officer could be questioned with reason.

But neither does it stand the Organization in good stead to have been afforded the contractual demands of conference and negotiations and to apparently forfeit them by non-reply.

Technically, the Carrier sought to 'confer and reach an understanding' as the rule demands. The Organization did confer, but did hot follow the ath toward reaching an understanding.

Under the circumstances of this situation we find that the Carrier technically ret its requirements ; thst the Organization failed to pursue the opportunities afforded it." (Emphasis Supplied)

In Second Division Award 2798 (Smith) that Division said:

"At issue here is the proper interpretation and application of Rule 2. which reads:

'Rule 2. There may be one, two, or three shifts employed. The starting time of any shift shall be arranged by mutual understanding bctveen the local officer

'and the employees' committee based on the actual service requirements.'

The differences between the parties arose as a result of the respondent changing the starting time of shifts. Each shift's starting time was in effect advanced one hour. Reparations are sought for each of the named claimants to the extent of pay for one hour, at the punitive rate.

In brief, the Organization asserts thnt the starting time of the shifts, prior to their change, 'had been, in effect, negotiated by virtue of which fact they (starting times) could not now be changed by the unilateral action of the Carrier, but to the contrary, were and are subject to change only in involving the procedures of Section 6 of the Railway Labor Act, as amended.

On the basis of the record here we conclude that the above quoted rule was not violated. The Organization was consulted, and presented with ample opportunity to present evidence of lack of need for the proposed change. No such evidence was forthcoming. The rule, as written, contemplates any change in starting times will be predicated on the requirements of the service. While the rule assures that the parties will exert their best effort to arrive at 2 mutual understanding, the failure to achieve this end does not carry with it the power of the Organization to, in effect, veto any such changes.

We conclude that the changes made were to meet the exigencies of the service, were not arbitrarily made, or in bsd faith 2nd thus not in contravention of Rule 2. See also Award 1320 of this Division." (Emphasis Supplied)

See Second Division Awards 4605 (Williams); 6691 (Bergman) and 7830 (Van Wart).

The theory of the Board's decision in each of the foregoing cases, where there was a contractual requirement to effect certain changes "by mutual agreement or understanding", is that the Union does not have a right to exercise a veto over the changes contemplated. As long as Carrier makes a good faith attempt to reach agreement, which certainly cannot be denied in this case, then the Board will not uphold the Petitioner's argument that Carrier is prohibited from making the changes effective without their concurrence. Thus, on the strength of these decisions alone, the claims should have been denied.

There is an additional argument pressed by Carrier which, based on proper rules of evidence and contract construction, required denial awards in these cases. As noted heretofore, it is Hornbook law that when a person has a duty to speak and remains silent, his silence will be considered an admission of the fact in issue. Regarding the issue of the General Chairman's duty to speak, the record shows Carrier made every good faith effort to handle all aspects of this case by conference and agreement, to the point of listing all the matters that were to be discussed and after discussion, those matters that were resolved to the satisfaction of the Organization's representatives. The Carrier also put the General Chairman on notice in each letter that he was expected to sign or state his disagreement. General Chairman Mix did neither.

The Board has discussed this problem in a series of awards from various Divisions and the principle is reflected in Award 22700 (Edgett) recently decided on January 11, 1980, where it was held:

> "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. 19827 (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 Awards Nos. 22081, 22148 and 22213."

In the case covered by Amtrak Arbitration Committee No. 15-11 (UTU V. B.N.) the Arbitration Board (Mr. N.H. Zumas) held:

> "While it my be argued that Carrier's letter of May 24, 1971 was conditional in that it was subject to approval of all interested employe representatives and that there were certain employe representatives who did not give their actual approval, the Board is of the opinion that the silence on the part of such representatives was tantamount to approval. It is universally accepted that where, as here, there is no action where action is called for, such inaction or silence constitutes acquiescence and acceptance of the terms and conditions performed. There is no basis, therefore, to find that Switchtender R. W. Winter was entitled to a May 13, 1971 seniority date on the Burlington Northern when he did not choose to enter the employ of Burlington Northern until May 2, 1972." (Emphasis Supplied)

The rule of evidence was stated by the Supreme Court of the United States in Baxter et al. v. Palmigiano, 425 U.S. 308, (1976)when they said:

> "* * * Indeed, as Mr. Justice Brandeis declared, speaking for a unanimous court in the Tod case, supra, which involved 8 deportation, 'Silence is often evidence of the most persuasive character.' 263 U.S., at 153-154. And just last Term in Hale, supra, the Court recognized that 'failure to contest an assertion. . . is considered evidence of acquiescence. . . if it would have been natural under the circumstances to object to the insertion of the question.' 422 U.S., at 176.[3]"
> (Emphasis Supplied)

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[3]The Court based its statement on 3A Wigmore, Evidence, Section 1042 (Chadboum rev. 1970), which reads as follows:

"Silence, omission, or negative statements, as inconsistent:

> (1) Silence, etc., as constituting the impeaching statement. A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the nonexistence of the fact. This conceded as a general principle of evidence (Section 1071 infra). There may be explanations indicating that the person 'had in truth no belief of that tenor; but the conduct is 'prim facie' an inconsistency.

There are several common classes of cases:

> '(1) Omissions in legal proceedings to assert what would naturally have been asserted under the circumstances.
> '(2) Omissions to assert anything or to speak with such detail or positiveness, when formerly narrating, on the stand or

The important-fact is that the General Chairman Mr. Mix, *never* contested the understanding, *a* fact reflectedbytherecord. Other parties representing the Claimants, challenged the change many aonths later, but the understandings were not reached with the Office Chairman nor with Mr. Swartz, bir. Mix's successor. Whether we consider the matter one of acquiescence by estoppel or one of evidentiary failure on the part of the Claioacts, the result is the same. A failure to answer left Carrier's assertion unchallenged. In Award 18605(Rimer) the principle was set forth 22 follows:

> "This Board must also give weight to the well established principle that material statements made by one party and accepted or not denied by the other may be accepted as established fact. (Award 9261)"

Award 16819 (Brown):

> "The applicable Scope Rule is insufficiently specific to protect the particular work herein involved, thus Petitioners' claim must fall absent a showing that such work had been by custom and usage reserved exclusively to the explaining craft. This was not done. On the contrary, Carrier's repeated assertions on the property that like work had been done by other crafts was never challenged by the Organization.

Footnote continued:

> 'elsewhere, the matter now dealt with.'
> '(3)Failure to take the stand at all, when it would have been natural to do so.'" (Emphasis in the original)

> 'In view of such assertions remaining uncontradicted, we will accept such as fact. The claim must therefore be denied."

Award 14385 (Wolf):

> "The statement that track indicators were operated by other crafts at other locations, was made on the property to the Organization and is admissible. It has been attacked, however, as mere assertion and not proof. An assertion which is not denied although there is both time and opportunity to deny it, must be deemed uncontroverted and, therefore, proof of its substance." (Emphasis Supplied)

There are literally hundreds of Awards on the four Divisions which have reached the same conclusion.

Thus, it was proven by the record that an agreement was reached with all the General Chairmen involved, including a Train Dispatcher's V.P. The Claimant's General Chairmen either reneged, or failed to reject when he had a duty to speak, and under the circumstances as the Supreme Court has stated it "is considered evidence of acquiescence."

The Majority's reference to Award 11068 (McMillen) is misplaced. That Award dealt solely with Carrier's failure to give notice to the Organization. The Statement of Claim presented to the Board by the Organization said:

> "(a) The Pennslyvania Railroad Company, hereinafter referred to as "the Carrier" violated the Schedule Agreement between the Parties effective June 1, 1960, specifically Regulation 3-G-1 of Part I, when during a period beginning August 1, 1960, and ending August 31, 1960, no

> advance notice was given to the General Chairman by the Carrier concerning the merging of the Zanesville Dispatching District and Dispatching District E in the Cincinnati office as contemplated by the aforementioned Regulation.
> (Emphasis Supplied)

The Organization's "Statement of Facts" declared:

> "No advance written notice of such merger of dispatching districts was given to the General Chairman of the Claimant Organization by Carrier's Manager of Labor Relations pursuant to Regulation 3-C-1, cited and quoted supra."

Moreover, the Organization conceded no agreement was needed in that case

> "because of the fact that all dispatching districts were, and are, within the same SENIORITY district, no such adjustments were required in view of the fact that exercise of rights within the same seniority district are provided for by already existing Agreement Rules."

The Board concluded that:

> "Whatever the intent of the parties were, the use of the word "or" in the Agreement is the deciding factor, so that when either the seniority or dispatching districts are involved thirty (30) days written notice must be given."

Thus, the Board never reached the issue involved in our case, which pertained to the General Chairman's failure to make an Agreement or his silent acquiescence in the terms of the Agreement. The only issue involved in Award 11068 was the failure to give notice and Carrier had certainly complied with that requirement in the cases represented by Awards 23174 & 23175.

The Awards are in error and we dissent.

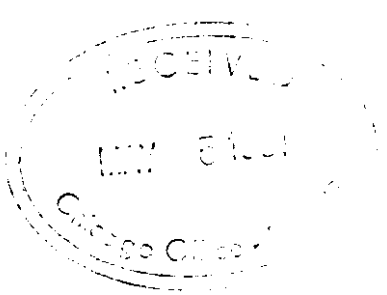
W. F. Euker

P. E. LaCosse

J. E. Mason

J. E. O'Connell

P. V. Varga



LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 23174 DOCKET TD-22621 AND AWARD 23175 DOCKET TD-22622

The Carrier Members' Dissent to Award 23174 Docket TD-22621 and Award 23175 Docket TD-22622 is without substance or merit and does not detract from these awards which properly adjudicated these disputes by interpreting and/or applying the applicable agreement language and which correctly sustained the claims because there was no agreement in writing to cover the manner in which the seniority of train dispatchers affected was to be exercised when dispatching districts or parts thereof were merged.

The Dissenters initially pointed to Award 23193, which was adopted on the same day as Awards 23174 and 23175, claiming that the instant claims also should have been dismissed without consideration of the merits of the claims. An appropriate dissent has been entered to Award 23193 Docket 22930, wherein it was pointed out that the Board in Award 23193 failed to perform its function and accomplish its purpose to adjudicate the dispute, as contained in Docket TD-22930, by interpreting and/or applying the Agreement language covering the merging of train dispatching districts. It is significant to note that the Referee in Award 23193 is also on the panel of arbitrators for Special Board 880. Perhaps this had some influence in the decison to dismiss the claim for lack of jurisdiction. It is also significant to note that Award 23193 stated:

> "Were we to issue an Award based on certain language of the agreement, that would not dispose of the case, because the record is specifically clear that Section 503 of the Act was raised in a timely manner on the property, and thus, a full exploration of the rights of the parties can only be achieved after a Section 503 adjudication is made". (EMPHASIS SUPPLIED)

The Dissenters continue by pointing to what they believe appears to be the major underpinning for the Majority's conclusion that no agreement was reached and quote from these awards. Then the Dissenters claim there was a fallacy in this contention and cite from a letter dated December 3, 1976 in support of this contention. However, the Majority did consider the December 3, 1976 letter as these awards state:

> "On December 3, 1976, a notice was sent to all Train Dispatchers advising them that on January 3, 1977, the territory handled on the "C" Desk would be transferred to the "D" Desk. No written agreement was entered into pertaining to the manner in which seniority of Train Dispatchers affected by the abolishment of Desk "C" was to be adjusted".

Rut even more important is the statement in Awards 23174 and 23175 reading:

> "There was no meeting of the parties or any agreement in writing reached between them as co the disposition of the remaining territory on Desk "C" as required by Regulation 3-G-l".

The Dissenters try to obfuscate the fact that no agreement in writing was made by showing that the Carrier gave notice implying that all Regulation 3-G-l requires is to give a notice of the intended changes. The Dissenters even reach the point of contending that silence left the Carrier's assertions unchallenged and, as a result, they become fact, citing awards and court cases in support of this contention. However, assertions, whether challenged or otherwise, are not a proper substitute for the agreement in writing required. Regulation 3-G-l clearly states that after proper advance notice "...the manner in which the seniority of Train Dispatchers affected is to be exercised shall be adjusted bv agreement, in writing.. .".

Awards 23174 and 23175 fully considered the arguments again raised

by the Carrier Members in their dissent, and the entire record in Dockets TD-22621 and TD-22622, and correctly ruled that the required written agreement had not been reached.

A review of Awards 23174 and 23175 will clearly establish that the Carrier Members' Dissent to these awards is without substance or merit and, therefore, the Carrier Members' Dissent does not, in any way, detract from the sound reasoning in Awards 23174 and 23175.

J. P. Erickson
Labor Member