

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22700
Docket Number CL-22571

William M. Edgett, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employes

PARTIES TO DISPUTE:

(
(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 date 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 employes in seniority order from the entire district absent an available qualified spare board employe.

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 may (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 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 over the dispute involved herein; and

That the Agreement was not violated.

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Claim denied.

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By Order of Third Division

ATTEST:

J.W. Pauls
Executive Secretary

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