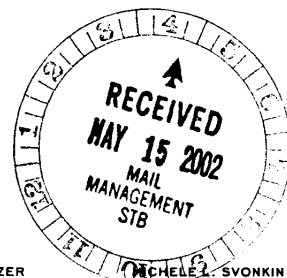


DID #0101947001

SHEA & GARDNER
1800 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036-1872

(202) 828-2000
FAX: (202) 828-2195



ROBERT T. BASSECHES
BENJAMIN W. BOLEY
RALPH J. MOORE, JR.
MARTIN J. FLYNN
STEPHEN J. POLLAK
DAVID BOOTH BEERS
JOHN D. ALDOCK
WILLIAM S. MOORE
JOHN TOWNSEND RICH
JAMES R. BIEKE
WILLIAM F. SHEEHAN
R. JAMES WOOLSEY
FREDERICK C. SCHAFFRICK
DAVID B. COOK
FRANKLIN D. KRAMER
PATRICK M. HANLON

TIMOTHY K. SHUBA
MICHAEL S. GIANNOTTO
JEFFREY C. MARTIN
WILLIAM R. HANLON
ELIZABETH RUNYAN GEISE
COLLETTE C. GOODMAN
LAURA S. WERTHEIMER
RICHARD M. WYNER
THOMAS J. MIKULA
NANCY B. STONE
CHRISTOPHER E. PALMER
MARK S. RAFFMAN
VALERIE E. ROSS
MICHAEL K. ISENMAN
JOHN MOUSTAKAS
HEATHER H. ANDERSON

May 15, 2002

205400

REENA N. GLAZER
HOWARD R. RUBIN
DONALD J. MUNRO
TIMOTHY G. LYNCH
MATTHEW M. HOFFMAN
JAMES CHAD OPPENHEIMER
M. DAVID DOBBINS
JILL ILAN INBAR
LISA M. HARRISON

MICHELE L. SVONKIN
ADAM M. CHUD
ELENA A. BAYLIS
ROSS E. DAVIES
RICHARD A. PASCHAL
RICHARD L. MATHENY III
REBECCA E. RAPP
BRIAN J. EGAN
DAVID P. HUITEMA
AUSTIN D. GERKEN, JR.

SENIOR COUNSEL
WARNER W. GARDNER
OF COUNSEL
RICHARD T. CONWAY
ANTHONY A. LAPHAM
LAWRENCE J. LATTO
ERIC C. JEFFREY
MICHELE A. ROBERTS
FRANCIS M. SHEA (1905-1989)

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 715
Washington, D.C. 20423

ENTERED
Office of the Secretary

MAY 16 2002

Part of
Public Record

FILED

MAY 15 2002

SURFACE
TRANSPORTATION BOARD

Re: Finance Docket No. 32549, -24
The Burlington Northern and Santa Fe Railway Company

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of the Petition for Review Of Arbitration Award in The Matter of The Arbitration Between Margaret Ellingson and Diane Suchy, Claimants, and The Burlington Northern and Santa Fe Railway Company, Carrier. I also enclose a diskette containing a copy of the petition in WordPerfect 8.0.

My firm's check covering the filing fee for this arbitration review proceeding (\$150.00) is enclosed.

An additional copy of the petition is enclosed for acknowledgment of receipt. Please date-stamp the copy and return it to our messenger. Thank you for your attention.

Very truly yours,

Lisa M. Harrison
Lisa M. Harrison

ENTERED
Office of the Secretary

MAY 16 2002

Part of
Public Record

Enclosures
cc: Walter Hodynsky

DID# 0101947001

205400

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32549 - 24



In the Matter of the Arbitration
Between Margaret Ellingson and Diane Suchy, Claimants
and The Burlington Northern and Santa Fe Railway Company, Carrier

PETITION FOR REVIEW OF ARBITRATION AWARD

FILED

MAY 15 2002

SURFACE
TRANSPORTATION BOARD

ENTERED
Office of the Secretary

MAY 16 2002

Part of
Public Record

Donald J. Munro
Lisa M. Harrison
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Charles W. Shewmake
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive, 3rd Floor
Fort Worth, TX 76131-2828
(817) 352-2358

*Attorneys for The Burlington Northern and Santa
Fe Railway Company*

FEE RECEIVED

May 15, 2002

MAY 15 2002

SURFACE
TRANSPORTATION BOARD

original

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW.	1
STATEMENT OF THE CASE.	2
ARGUMENT.	5
I. Review of the Suchy Award is Appropriate Under the Board's <i>Lace Curtain</i> Standard.	5
II. A Two-Year Statute of Limitations Applies to Claims Seeking Labor Protective Benefits When no Other Period is Specified in an Implementing Agreement Imposing Labor Protective Conditions.	6
III. The Doctrine of Laches Prohibits a Claimant from Unreasonably Delaying in Pursuing her Claim for Labor Protective Benefits.	9
CONCLUSION.	12

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32549

In the Matter of the Arbitration
Between Margaret Ellingson and Diane Suchy, Claimants
and The Burlington Northern and Santa Fe Railway Company, Carrier

PETITION FOR REVIEW OF ARBITRATION AWARD

The Burlington Northern and Santa Fe Railway (BNSF) hereby petitions this Board, pursuant to 49 C.F.R. § 1115.8, to review and set aside an arbitration decision and award issued to Diane Suchy on April 25, 2002, under Article I, § 11 of the *New York Dock* Conditions. The award to Ms. Suchy raises important issues concerning the timeliness of claims seeking protective benefits under *New York Dock* when the implementing agreement imposing such benefits does not specify a time period for filing claims.

ISSUES PRESENTED FOR REVIEW

1. Should the two-year limitations period provided as part of the statute governing the Board's imposition of labor protective conditions apply to claims seeking labor protective benefits when no other period is specified in the implementing agreement imposing labor protective conditions?
2. Should a claim be barred by the doctrine of laches when the claimant has unreasonably delayed in pursuing her claim?

STATEMENT OF THE CASE

The New York Dock Implementing Agreement. When the Interstate Commerce Commission (ICC) approved the merger of the Burlington Northern and the Santa Fe Pacific Railroads, it imposed *New York Dock* labor protection. See *Burlington Northern Inc. – Control & Merger – Santa Fe Pac. Corp. & Atchison, Topeka & Santa Fe Ry.*, 10 I.C.C.2d 661 (1995) (*BN-SF Merger Decision*). The ICC was required, pursuant to the Interstate Commerce Act, to impose labor protective conditions. See 49 U.S.C. § 11347 (1995), amended and recodified, 49 U.S.C. § 11326.¹

Facts Concerning The Untimely Nature of Ms. Suchy's Claim. The facts concerning the timeliness of Ms. Suchy's claims are not in dispute. Following the approval of the BN-SF merger, the two companies began combining operations. Ms. Suchy was notified in November of 1995 that her exempt position was to be abolished effective January 1, 1996. By letter dated November 21, 1995, Ms. Suchy requested that BNSF advise her whether she would be eligible for *New York Dock* benefits.² On December 14, 1995, Burlington Northern's Director of Labor Relations responded and stated the Company's "position that you are not covered under the *New York Dock* conditions...."³ The Company also advised Ms. Suchy how to progress her claims further:

¹ This function of the ICC was transferred to the Surface Transportation Board (Board), effective January 1, 1996, pursuant to Pub. L. No. 104-88.

² Attachment 1. Counsel for claimant indicated for the first time in 2000 that this "initial claim" had been filed, see Attachment 2, and did not produce the Nov. 1995 letter until March 21, 2002.

³ Attachment 3.

"If you continue to believe you are covered by the *New York Dock* conditions and wish to pursue your claim, please write to the undersigned and enclose any information you feel supports the position that your employment as manager of administration to the Chief Mechanical Officer is covered under the *New York Dock* conditions.

"To assist you in this endeavor, I am enclosing a copy of an arbitral award that will provide guidance to you as to the type of information which you need to provide to the Company to progress your claim for *New York Dock* benefits."⁴

It is undisputed that Ms. Suchy did not submit a formal claim for *New York Dock* benefits until June 29, 1998,⁵ more than two and one-half years after her exempt position was abolished.

The June 29, 1998, claim included for the first time a request for arbitration under *New York Dock*.

The Arbitration Proceeding. BNSF and Claimants Ms. Suchy and Ms. Ellingson agreed to submit their dispute to arbitration pursuant to Article 1, § 11 of *New York Dock*. They agreed on the selection of Christine D. Ver Ploeg as chairman and neutral member of the board. The parties filed and exchanged written submissions in advance of the arbitration hearing, which was held on April 19, 2002, in St. Paul, Minnesota.

In its submission, BNSF asserted that Ms. Suchy and Ms. Ellingson had occupied managerial positions that excluded them from the benefits *New York Dock* provides for "employees." In addition, BNSF asserted that the claims were barred by the applicable statute of limitations and/or the doctrine of laches because the claimants filed their claims more than two years after their positions were eliminated. This timeliness argument was presented as an independent ground for denying the claims.

⁴ *Id.*

⁵ Attachment 4.

In response, Claimants Ms. Suchy and Ms. Ellingson argued that they were covered employees under the *New York Dock* conditions because they did not exercise significant managerial responsibilities. With respect to the timeliness issue, the Claimants contended that the two-year statute of limitations and the doctrine of laches did not apply to their claims, and that in any event, their filings were timely even if these grounds were applicable.

The Award. On April 25, 2002, Arbitrator Ver Ploeg issued an award denying Ms. Ellingson's claim and sustaining Ms. Suchy's claim.⁶ The award denied Ms. Ellingson's claim because her position was "more clearly a management than a rank and file/ subordinate official position" and therefore she did not meet the definition of an "employee" under the *New York Dock* Conditions. See Award at 5-8. BNSF is not requesting review of the award to Ms. Ellingson.

The award granted Ms. Suchy's claim. First, Arbitrator Ver Ploeg determined that Ms. Suchy's position met the definition of employee established by the *New York Dock* Conditions because "Ms. Suchy's position appears most clearly to have been that of a highly responsible administrative assistant rather than that of a manager." See Award at 11-12. Despite BNSF's submission of the affidavit of the head of Ms. Suchy's department, which described Ms. Suchy as occupying a "decision-making role," Arbitrator Ver Ploeg stated that "[a]bsent some form of concrete evidence, I am unable to assume that Ms. Suchy had decision-making authority with respect to personnel, budgetary, and other managerial matters." Id.

Next, Arbitrator Ver Ploeg concluded that Ms. Suchy's claim was timely filed. See

⁶ Attachment 5.

Award at 12. Arbitrator Ver Ploeg concluded that Ms. Suchy's letter of November 21, 1995 was timely notice of her claim. Id. Arbitrator Ver Ploeg also found however, that "it remains disturbing that Ms. Suchy did not further press this claim until 1998. If [BNSF] had shown more than speculative prejudice as a result of this two and one-half year delay, decision on this question may well have gone the other way." Id.

ARGUMENT

I. Review of the Suchy Award is Appropriate Under the Board's *Lace Curtain* Standard.

BNSF requests that the Board review the Suchy Award pursuant to the authority granted by 49 C.F.R. § 1115.8. The Board will review arbitration awards when faced with "recurring or otherwise significant issues of general importance regarding the interpretation of our labor practice conditions." *Chicago & North Western Transp. Co. – Abandonment – Near Dubuque and Oelwein, IA*, 3 I.C.C.2d 729, 736 (1987) ("*Lace Curtain*"), *aff'd sub nom. International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). See also, e.g., *Rio Grande Industries, Inc. – Control–Southern Pac. Transp. Co.*, Finance Docket No. 32000 (Sub-No. 11), 1996 STB LEXIS 135 at *15 (served Apr. 29, 1996) ("We find that the award is reviewable on its merits under *Lace Curtain* because it involves an important and recurring issue of the proper calculation of the test period averages for dismissal or displacement allowances for employees under all of our labor protective conditions"); *Grand Trunk Western R.R.–Merger–Detroit & Toledo Shore Line R.R.–Arbitration Review*, Finance Docket No. 28676 (Sub-No. 2), 1996 STB LEXIS 55 at *6 (served Feb. 26, 1996) (as corrected March 14, 1996) (reviewing arbitration award because the appeal "raises a significant issue of how provisions of an implementing agreement are to be

interpreted in light of the New York Dock conditions on which the Agreement is based”), *aff’d sub nom. United Transp. Union v. STB*, 114 F.3d 1190 (6th Cir. 1997).

The Suchy Award should be reviewed under this standard and set aside. Like other arbitration decisions that the Board has reviewed, the Suchy Award raises important issues concerning the implementation of an agreement imposing labor protective conditions. In this case, the *BN-SF Merger Decision* does not specify a period for the timely filing of claims seeking *New York Dock* benefits. The Suchy Award fails to address the timeliness issue either in terms of the statute of limitations or under the doctrine of laches. This issue will recur whenever timeliness is contested for claims based on an implementing agreement that fails to specify a time period for filing claims. Thus, it is imperative that the Board clarify the limitation period for assessing the timeliness of a claim for benefits under *New York Dock* when there is no period established in the implementing agreement.

II. A Two-Year Statute of Limitations Applies to Claims Seeking Labor Protective Benefits When no Other Period is Specified in an Implementing Agreement Imposing Labor Protective Conditions.

Where an implementing agreement imposing labor protective conditions pursuant to 49 U.S.C. § 11326, does not contain a deadline for filing a claim for benefits, the general two-year statute of limitations for filing complaints with the Board applies. See 49 U.S.C. § 11705(c). The application of this general statute of limitations is mandated both by a plain-text reading of the relevant statutory provisions and by judicial precedent. Accordingly, the Suchy Award must be set aside because Ms. Suchy did not file a formal claim for labor protective benefits until two and one-half years from the date her claim accrued.

Section 49 U.S.C. § 11705(c) provides a two-year statute of limitations for complaints

filed with the Board that are based on 49 U.S.C. § 11704(b).⁷ Section 11704(b), in turn, provides that a carrier is liable for damages that are a “result of an act or omission of that carrier in violation of this part [part A of Title 49 of the U.S. Code].” Part A of Title 49 of the U.S. Code contains the Board’s requirement to impose labor protective conditions such as the *New York Dock* conditions. See 49 U.S.C. § 11326. Thus, the two-year statute of limitations set out in § 11705(c) applies to claims seeking benefits under the *New York Dock* conditions because those claims are based on benefits established pursuant to part A of Title 49.

This plain-text reading of the statute is bolstered by “well settled” judicial precedent that the limitation period of § 11705(c) applies to “complaints filed in the courts as well as those filed with the I.C.C.” See *Modin v. New York Cent. Co.*, 650 F.2d 829, 834 (6th Cir. 1981). It is also “clear” that this statute of limitation applies to complaints “involving subject-matter directly covered by the [Interstate Commerce] act,” even if those claims are not “based directly” upon the Interstate Commerce Act. *Id.* (citation omitted).

In *Modin*, the court applied the two-year statute of limitations of the Interstate Commerce Act (ICA) to a claim based upon the employee protection provisions ordered by the ICC pursuant to the ICA. The plaintiff was a widow of a former exempt employee who had become a scheduled employee after the merger of two major railroads. The carrier canceled the employee’s insurance policy once he became a scheduled employee because, as a union member, he was no longer a member of the class of employees covered by the exempt group policy. The plaintiff

⁷ 49 U.S.C. § 11705(c) provides that “[a] person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues.”

sued, alleging a violation of the ICC order that provided protective benefits to non-union employees. The court held that the ICA two-year statute of limitations barred plaintiffs' claim based on benefits provided pursuant to the protective agreement. See 650 F.2d at 834.

As in *Modin*, Ms. Suchy's claim is based upon a subject matter – entitlement to benefits under the *New York Dock* conditions – that is “directly covered” by the ICA. Like the plaintiff in *Modin*, Ms. Suchy's claim is based upon the protective conditions ordered by the ICC pursuant to its authority to approve railroad mergers. Indeed, the ICC has recognized that questions over the “scope or coverage” of *New York Dock* conditions implicate the ICC's “statutory responsibility to impose labor protection.” See *Lace Curtain*, 3 I.C.C.2d at 733 (citing 49 U.S.C. § 11347 as one of the sources of that statutory responsibility). This two-year statute of limitations therefore applies to Ms. Suchy's claim.

Ms. Suchy's claim arose in December 1995, when her position was officially terminated and when she received a letter from BNSF stating that she was not entitled to *New York Dock* benefits. It is undisputed that Ms. Suchy did not invoke arbitration pursuant to *New York Dock* until June 29, 1998, more than two and one-half years after her claim accrued. Ms. Suchy's November 1995 letter preliminary inquiry as to whether she qualified for protective benefits is not a “complaint” sufficient to satisfy the two-year statute of limitations because (1) it occurred prior to the date she was actually terminated; and/or (2) the letter does not invoke arbitration, which is the necessary procedure for resolving disputes concerning benefits under *New York Dock*. Furthermore, even if the premature November 1995 letter could be deemed an initial claim, Ms. Suchy waived her right to arbitrate this claim pursuant to *New York Dock* because she delayed for more than two and one-half years to file for arbitration, thereby failing to satisfy the

two-year statute of limitations. Ms. Suchy's claim, therefore, must be denied on statute of limitations grounds.

III. The Doctrine of Laches Prohibits a Claimant from Unreasonably Delaying in Pursuing her Claim for Labor Protective Benefits.

Ms. Suchy's claim is time-barred under the doctrine of laches even if the claim is somehow considered to have met the two year statute of limitations set out in 49 U.S.C. § 11705(c). Arbitrator Ver Ploeg's finding that Ms. Suchy's two and one-half year delay in establishing her claim was "disturbing" compels the conclusion that the delay was unreasonable and prohibits her claim on timeliness grounds.

As arbitration panels have observed, "[c]ertainly, the doctrine of Laches has been recognized in this industry as well as by other arbitral precedent to bar claims filed beyond a reasonable time period." *In re Arbitration between Southern Ry. and IBB*, at 1 (Muessig 1990).⁸ See also *Grand Trunk Western R.R. Company*, 1996 STB LEXIS 55, at *12 (as corrected Mar. 14, 1996) (stating that "ICC and arbitral precedents . . . establish that not only may claims be barred by laches, but also that [a delay of 11 months has] been found sufficient to bar claims."). As the panel in *Southern Ry.* explained,

"[t]he theory underlying the Laches doctrine is that the failure to litigate a claim presently by deferring action until some unspecific but distant time in the future result in bias or prejudice the party against who the claim is ultimately filed. The purpose of Laches is to bar the submission of stale claims. Clearly, in employee protective matters, it is critical that claims be filed without delay." *Id.* at 1-2 (emphasis supplied).

⁸ Attachment 6.

In *Southern Ry.*, the arbitration panel found the claimants' delay in filing "unreasonable" because the claimants "gave no reason for waiting almost three years from the time that they claimed to have been put in a 'worse position' until the claims were filed." *Id.* at 2. Accordingly, the panel denied claimants' claim.

In this case, Arbitrator Ver Ploeg found Ms. Suchy's delay in failing to press her claim "disturbing." Award at 12. Nonetheless, the award did not apply laches to bar the claim, presumably because of the finding that BNSF had only shown "speculative prejudice as a result of this two and one-half year delay." *Id.* This ruling was egregious error because *Southern Ry.* establishes that a long delay in pursuing a claim for protective benefits results in *per se* prejudice. In analogous situations, courts have refused to extend the time for plaintiffs to file fact-based labor claims because of the resulting prejudice to the employer. In, *NLRB v. McCready and Sons, Inc.*, 482 F.2d 872, 875 (6th Cir. 1973), the court explained the nature of this prejudice:

"Establishment of [the employer's] defense could and probably would require reference to facts and occurrences surrounding the [dispute]. With the passage of time, those facts become harder to prove as memories fade and witnesses become unavailable. [Prior to a plaintiffs' filing], the employer is left in a precarious position, uncertain of his liability and bearing an onus of defense which increases with time."

Accordingly, Ms. Suchy's unreasonably delay has resulted in *per se* prejudice to BNSF and laches should bar her claim.

Moreover, the Suchy Award demonstrates the actual prejudice that BNSF has suffered as a result of Ms. Suchy's unreasonable delay in invoking arbitration under *New York Dock*. Arbitrator Ver Ploeg's finding that Ms. Suchy met the definition of employee set out in *New York Dock* was based on the lack of "concrete evidence" corroborating the affidavit of Mr. Edward L.

Bauer, which attested to Ms. Suchy's decision-making authority. See Award at 11-12. Ms. Suchy's two and one-half year delay in filing a claim for arbitration obviously hampered BNSF's ability to locate and present documents and witnesses that would qualify as "concrete evidence." In fact, during the arbitration proceeding, BNSF was unable to present Mr. Bauer as a witness who could testify on the nature of Ms. Suchy's managerial duties because he is retired and unavailable to testify. Thus, contrary to Arbitrator Ver Ploeg's conclusion, BNSF suffered more than "speculative prejudice" as a result of Ms. Suchy's unreasonable delay in filing her claim.

Because of the resulting prejudice to a carrier when there is a lengthy delay in filing a claim for benefits, a claimant has a "duty" to initiate a claim for protective benefits "within a reasonable time" after the claim arises. *In re Arbitration between TCU and Norfolk & Western Ry.*, at 4 (LaRocco 1990).⁹ In *TCU*, Referee LaRocco held that the claimant failed to meet this duty when the claimant delayed for more than two years and seven months before initiating a "formal protective benefit claim." *Id.*

Following these decisions, laches must bar Ms. Suchy's claim because Ms. Suchy did not file her claim within a reasonable time. Arbitrator Ver Ploeg found that it was "disturbing that Ms. Suchy did not further press this claim until 1998." Award at 12. Implicit in this finding is the fact that Ms. Suchy failed to satisfy her duty to press her claim in a reasonable amount of time. By finding that the resulting prejudice to BNSF was only "speculative," the award improperly shifts too high a burden on the carrier to show prejudice, and relieves the claimant of her duty to file her claim within a reasonable time.

⁹ Attachment 7.

CONCLUSION

For the foregoing reasons, the Board should review and set aside the Award to Ms. Suchy.

Respectfully Submitted,



Donald J. Munro
Lisa M. Harrison
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Charles W. Shewmake
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive, 3rd Floor
Fort Worth, TX 76131-2828
(817) 352-2358

*Attorneys for The Burlington Northern and Santa
Fe Railway Company*

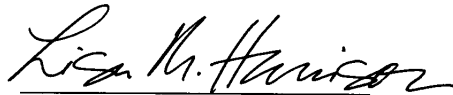
Dated: May 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2002, a true copy of the foregoing Petition for Review of Arbitration Award, and attachments thereto, submitted by The Burlington Northern and Santa Fe Railway Company, was served by first class mail, on the following:

Walter Hodynsky
Heywood & Cari
1200 Hosford St, Suite 106
Box 125
Hudson, WI 54016

Attorney for Claimant Diane Suchy

A handwritten signature in cursive script, reading "Lisa M. Harrison".

Lisa M. Harrison

ATTACHMENTS

1. Letter dated November 21, 1995
2. Spreadsheet listing "claim filed" dates
3. December 14, 1995 letter
4. Letter dated June 29, 1998
5. Award, In the Matter of Arbitration Between Margaret Ellingson and Diane Suchy, Claimants, and The Burlington Northern and Santa Fe Railway Company, Carrier, dated April 25, 2002.
6. *In re Arbitration Between Southern Ry. and IBB* (Muessing 1990)
7. *In re Arbitration Between TCU and Norfolk & Western Ry. (LaRocco 1990)*

1

Diane L. Suchy
5513 Cedar Breaks Drive
Fort Worth, TX 76137
(817) 581-6516

Certified Return Receipt Requested

November 21, 1995

Mr. James L. Noel
Vice President Staffing and Development
Burlington Northern Santa Fe Railway
3000 Continental Plaza
777 Main Street
P. O. Box 961030
Fort Worth, TX 76161-0030

Dear Mr. Noel:

Referring to your letter of November 1, 1995, presented to me by Jim Mills, advising my position was eliminated and I was not placed on an exempt position as a result of the integration (merger) of the Burlington Northern and Atchison, Topeka and Santa Fe Railway.

As you are aware my service date is March 5, 1970, and I also hold seniority under the TCU (BRAC) Agreement. Prior to electing any of the options presented to me by Jim Mills in your letter, please advise if I will be entitled to a displacement allowance pursuant to Finance Docket No. 28250 (commonly referred to as New York Dock); Article 1, subparagraph 1B for the six year duration of the protective period as defined in Article 1, Section 1D?

Should Burlington Northern Santa Fe (BNSF) determine that I would not be entitled to a displacement allowance as a result of any possible exercise of seniority on my behalf, this is to advise as a result of the BNSF's action, it is my desire to elect a dismissal allowance as defined in Article 1, Section 1C, for the duration of the six (6) year protected period. (Attached for your ready reference is copy of Article 1, subparagraphs B, C, and D.)

After contacting a financial planner, I request that you provide a response as quickly as possible, as I have to make a very difficult decision by December 31, 1995, as indicated in your letter.

Also, I have been informed that my position has been filled by an employee much younger than I, therefore, I am also requesting information relative to her age, experience and salary.

Sincerely,

Diane L. Suchy

Attachment

2

<u>CLAIMANT</u>	<u>POSITION TITLE/LOCATION</u>	<u>GRADE & MO. SALARY</u>	<u>JOB ABOLISHMENT NOTICE DATE</u>	<u>ABOLISHMENT EFFECTIVE</u>	<u>CLAIM FILED</u>	<u>ADDITIONAL INFORMATION</u>
1. Diane Suchy	Manager-Administration Mechanical Department Forth Worth	Grade 17 4,665	November 1, 1995	January 1, 1996	June 29, 1998	Initial claim to Wendel Bell on November 21, 1995. Denied on 12/14/95
2. Margaret Ellingson	Manager-Asset Disposition Purchasing and Material Forth Worth	Grade 18 4,330	November 8, 1995	January 1, 1996	June 11, 1998	Initially attempted to progress claim to labor relations officer Stan Von Helmst in January 1996; but not allowed.
3. Joel Peterson	EDI Specialist Marketing Department Forth Worth	Grade 16 4,070	November 8, 1995	January 1, 1996	June 11, 1998	Paid union dues
4. Eugene L'Allier	Assistant Material Manager Material Department Seattle	Grade 15 3,875	November 8, 1995	January 1, 1996	June 29, 1998	Under BRAC scope agreement; paid 100% of union dues
5. Patricia Mike	Technical Analyst ISS St. Paul	Grade 13 4,196	June 30, 1996	August 14, 1996	May 26, 1998	Paid union dues, Requested to remain in old position for carrier convenience
6. David Mechavich	Supervisor Credit and Collections Finance Department St. Paul	Grade 14 3,765	February 20, 1996	April 8, 1996	September 9, 1998	Paid union dues/Under scope agreement

3



BURLINGTON NORTHERN RAILROAD

3000 Continental Plaza
Fort Worth, Texas 76102,
(817) 333-3004

December 14, 1995

Ms. Diane L. Suchy
5513 Cedar Breaks Drive
Fort Worth, Texas 76137

Dear Ms. Suchy:

I am responding to your letter to Mr. Noel dated November 21, 1995, in which you make a claim for *New York Dock* benefits as a result of the abolishment of your position as manager of administration.

After reviewing your position, your salary band, and bonus opportunity, it is my position that you are not covered under the *New York Dock* conditions that were imposed by the Interstate Commerce Commission on the approval of the control by Burlington Northern Inc. of the Santa Fe Pacific Corporation. If you continue to believe you are covered by the *New York Dock* conditions and wish to pursue your claim, please write to the undersigned and enclose any information you feel supports the position that your employment as manager of administration to the Chief Mechanical Officer is covered under the *New York Dock* conditions.

To assist you in this endeavor, I am enclosing a copy of an arbitral award that will provide guidance to you as to the type of information which you need to provide to the Company to progress your claim for *New York Dock* benefits.

You requested information about the employee who filled your position as manager of administration. I have been informed by Jeanne Michalski that no person has filled your position.

Sincerely,

Wendell A. Bell
Director, Labor Relations

4

JOHN D. HEYWOOD
Of Counsel
SAMUEL R. CARI*
Court Commissioner
WALTER HODYNSKY*
*Also Admitted to Practice
in Minnesota

HEYWOOD and
ATTORNEYS AT LAW CARI S.C.

MICHELLE M. SIMBRO
Legal Assistant
DIANNE K. BENSON
Legal Assistant
CAROL McDANIEL
Office Manager

June 29, 1998

Mr. Wendell Bell
Director Labor Relations
BNSF Railroad Company
2600 Lou Mink Drive
P.O. Box 961030
Forth Worth, TX 76161-0030

RE: New York Dock Employee Protection Conditions

Dear Mr. Bell:

We have been retained by Ms. Diane L. Sucky to represent her in her claim for benefits under the New York Dock Employee Protective Conditions to which she is entitled to as the result of the abolishment of her BN exempt position on or about December 31, 1995 following the Burlington Northern (BN) Atchison, Topeka and Santa Fe (AT&SF) Railway Merger. Please consider this letter as a claim brought on behalf of Ms. Ellingson under the New York Dock Employee Protective Conditions.

At the time of the BN AT&SF Railway Merger, Ms. Sucky was employed as a Manager of Administration in the Mechanical Department located in Ft. Worth, Texas, a position she had held since 1984. Ms. Sucky was notified by letter dated November 1, 1995 that said position had been eliminated and she was not offered any other exempt position, but was given the option of either accepting a separation allowance or exercising her seniority and if she did neither, she would be terminated from the Carrier's employment effective December 31, 1995. Our client chose to exercise her seniority back to the clerical craft and placed herself on a Customer Service Representative (account representative) position in the Revenue Management office in the St. Paul GOB. Her rate of pay on that position was \$122.87 per day. Through subsequent displacements and/or bids she transferred to a Revenue Support Specialist Position where she is currently working in the Revenue Management Department having a daily rate of \$133.32. However, this is still considerably less than her monthly salary of \$4665 as a Manager of Administration when her job was terminated.

A letter which Ms. Sucky received from Mr. James L. Noel, Vice President, Staffing and Development advised her of the elimination of her Manager of Administration position and began, "As has been communicated to you, Burlington Northern (BN) and the Atchison, Topeka and Santa Fe Railway are reducing forces as part of the integration [merger] of both companies

work forces." It is our position that the elimination of Ms. Sucky's Manager of Administration position as well as numerous other similar jobs in other departments is a merger related transaction, i.e., an action taken pursuant to the authorization of the Interstate Commerce Commission for which New York Dock Employees Protective Conditions were specifically imposed.

As you are well aware, the Interstate Commerce Commission in Finance Docket No. 3549, Decision No. 38 dated August 16, 1995 approved the merger of the Burlington Northern Railroad Company with the Atchison, Topeka and Santa Fe Railway Company. At page 110 of said decision, the ICC imposed the New York Dock Protective Conditions, holding as follows:

"We further find that any rail employees of applicants or of WUTR affected by the transaction exempt in finance Docket No. 32549 (Sub No. 1), should be protected by the conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District, 360 ICC 60, 84-90 (1979), unless different conditions are provided for in the labor agreement entered into prior to consummation of common control, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of the affected employees."

You will note, that pursuant to the above language, the protective conditions apply to "any rail employees of applicants." As such, non-agreement or exempt employees are also covered under the terms of the Employee Protective Conditions as is expressly set forth in the New York Dock Decision, in Article IV, which states in pertinent part:

"Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same level of protection as are afforded to members of the labor organizations under these terms and conditions."

XXX

Thus, it is our position that when Ms. Sucky's job in the Mechanical Department was eliminated, she could no longer hold any other exempt employee position nor was she offered any position which, required that she exercise her clerical seniority to a Customer Service Representative (account representative) position in the Revenue Management Department. She is, therefore, a "displaced employee who is entitled to a displacement allowance under Article I Section 5 of New York Dock Protective Conditions. Concurrently, she is also covered under Article I Section 8 regarding fringe benefits since not only did she suffer a significant decrease in salary from \$4665 per month to her current daily rate of \$133.32, but she also lost his profit sharing, pension, yearly bonus, short term and long term disability coverages, higher life insurance along with the opportunity to purchase additional insurance, company credit card and phone calling card, along with the flexibility in his working hours. To repeat, under New York Dock she is entitled to these benefits which are hereby claimed for her with this claim.

Support for this claim is found not only in the above referenced ICC decision approving the merger as both carriers, but in the Burlington Northern and Atchison, Topeka and Santa Fe's merger application. Specifically, your attention is respectfully directed to the verified statements

merger application. Specifically, your attention is respectfully directed to the verified statements of Thomas N. Hund and Allen W. Speaker, attached to Volume II of the Railroad Control and Merger Application, and Section 1180.6 (A) (2) (V) titled Labor Impact Exhibit, together with supporting verified statements. At page two, commenting specifically on non-agreement employees who would be affected by the merger, it is stated:

"the combined railroads have general offices in four primary locations: Fort Worth, Texas; St. Paul, Minnesota; Schaumburg, Illinois; and Topeka, Kansas. In general, consolidating the two railroad operations would affect non-agreement employees at all four offices. Management does not intend, however, to close any of the four offices.

As set forth in the Exhibit and described in the verified statement of Messrs. Hund, and Snyder, it is projected that by the end of the third year following the consolidation, a total of approximately 1,350 non-agreement positions will have been eliminated." (emphasis added)

The above is clearly apparent from the Labor Impact Exhibit regarding Fort Worth, Texas, where it is shown that there would be jobs abolished, including that of the claimant here. Indeed, the carriers expected this for in the statement referenced above, the imposition of the New York Dock Employee Protective Conditions was anticipated:

"Applicants have assumed that the Employee Protective Conditions Established is Finance Docket No. 28250 New York Dock Railway-Control-Brooklyn, Eastern District Terminal, 360 ICC 60 (1979) would pertain to applicable employees affected by the consolidation."

Additional support for the instant claim is also found in numerous arbitration awards under Section 11 of the New York Dock Employee Protective Conditions which recognize that exempt employees are also covered by those conditions and when adversely affected, they are entitled to substantially the same benefits as that scheduled employees. In those cases, as I am sure you are well aware, the arbitrators have focused on whether the particular claimant was, in fact, an employee covered under the New York Dock Protective Conditions. Were the employee a scheduled or agreement employee, there would be absolutely no question that he would be covered. But, concerning management employees, their eligibility for benefits under the New York Dock Conditions, involves consideration of several factors, including: their supervisory authority or policy making responsibility, the ability to supervise other employees and whether the skills possessed by the claimant are such that they could be transferred to outside industries. See, e.g., In the matter of arbitration between James M. Benham and the Delaware and Hudson Railway Co. (Robert M. O'Brien, arb.)

In the case of Ms. Sucky, she had no supervisory authority or any authority to hire or fire, or make any policy decisions. She was not authorized to expend any funds nor did she supervise any other employees. What she did do was assist the System Chief Mechanical Officer administer said department. As such, she is clearly an employee contemplated under Article IV of the New York Dock Employee Protective Conditions. See in this regard arbitration award

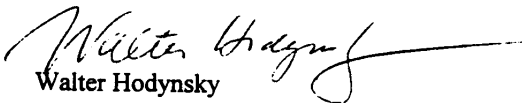
between Thomas M. Curley, Charles D. Ernst. et al v. Missouri Pacific Railroad Co. (David H. Brown, arb.).

Thus for the reason set forth above, we respectfully request that Ms. Sucky be afforded the displacement allowance she is entitled to along with fringe benefits which have been denied her following the elimination of her exempt employee position on or about December 31, 1995. This would include, but is not limited to yearly bonuses, pension, health and life insurance coverage and thrift and profit sharing plan, etc. Should the claim be disallowed we also request a telephone conference with you or your designated representative to further discuss our position in this case and if necessary, to proceed to arbitration of this claim under Section 11 of the New York Dock Conditions.

It should be pointed out, however, that I have previously submitted three claims in behalf of BNSF employees under identical circumstances. These claims have been allowed as presented. For sake of consistent handling, I assume that you will treat this case in a like fashion. If so, please calculate Ms. Sucky's displacement allowance and provide the necessary claim forms for her to complete to receive her back pay as well as to submit in the future months for which she is eligible for benefits.

I will look forward to your prompt reply.

Very truly yours,
HEYWOOD & CARL, S.C.


Walter Hodynsky

WH:lsb

cc: Diane L. Sucky

5

IN THE MATTER OF THE ARBITRATION BETWEEN

Margaret Ellingson
and
Diane Suchy

Claimants

and

Burlington Northern & Santa Fe Railroad

Carrier

ARBITRATOR: Christine D. Ver Ploeg

DATE AND PLACE OF HEARING: April 19, 2002
Offices of BN & SF Railway Co.
St. Paul, Minnesota

DATE OF CLOSE OF RECORD: April 19, 2002

DATE OF AWARD: April 25, 2002

ADVOCATES

For the Claimants

Walter Hodynsky
Heywood & Cari
1200 Hosford St., Suite 106
Box 125
Hudson, WI 54016

For the Carrier

Charles W. Shewmake
BN & SF Railway Co.
4500 Lou Menk Dr., 3d Floor
Fort Worth, TX 76131-2830

ISSUE:

Are the Claimants covered by the terms of the New York Dock conditions?

BACKGROUND

These cases have been brought by Margaret Ellingson and Diane Suchy, who are employed by the Burlington Northern & Santa Fe Railroad (hereinafter "Carrier"). The dispute which gives rise to this Arbitration stems from the Carrier's refusal to grant the Claimants benefits provided pursuant to the New York Dock conditions. The Claimants submit that these refusals violate the terms of those conditions; the Carrier submits that they do not.

The parties agree on most of the background facts pertinent to this arbitration. It is undisputed that in 1971 the Carrier hired Margaret Ellingson as a key punch operator, which was a clerical unionized position. In 1987 she was promoted to Manager in Scrap and Equipment Sales in the Purchasing and Material Department. In November 1990, in order to learn new skills, she accepted an Assistant Material Manager position. She held that position until March 1992 when she returned to the Manager of Scrap and Equipment Sales position. In May of 1992 Ms. Ellingson's position was transferred from Minnesota to Texas and in late 1994 it was upgraded to a grade 18 and re-titled as Manager, Asset Disposition.

It is similarly undisputed that in 1970 the Carrier hired Diane Suchy in a unionized clerical position. In 1986 she was promoted to the position of Manager of Administration in the Mechanical Division in Kansas, at salary grade 17. In 1991/1992 Ms. Suchy was transferred in that position to Fort Worth, Texas.

In mid-1994 senior management of the then separate Burlington Northern and the Santa Fe Pacific railroads decided to merge. Both railroads filed their application for this merger with the ICC in October of 1994, which the ICC approved in August of 1995. In its August 1995 decision the ICC conditioned approval of the merger on the Carrier's compliance with "the labor protective conditions set out in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), generally known as the New York Dock Conditions.

Article IV of the New York Dock Conditions reads:

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the

interpretation, application or enforcement of any provisions hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

The apparent intent of the New York Dock Conditions has been to cushion the harsh impact of railroad mergers by providing special benefits to railroad employees who for some unique reason are not represented by a union. These protections have been designed to protect, at least partially, employees whose skills are narrowly specialized within the railroad industry. This rationale has been expressed as follows:

The rationale and history of the benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. In the Matter of Arbitration Between B.J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

Despite the literal language of the New York Dock Conditions—language that could be read to mean that *all* railroad road employees not in a union are eligible for the same benefits as the unionized employees--subsequent decisions have established, and the parties agree, that the term "employee" is a term of art that:

...was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather...to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other than administrative, managerial, professional or supervisory in nature. In the Matter of Arbitration Between B. J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

It is against this backdrop that in November of 1995 the Carrier wrote to the Claimants advising them that it had eliminated their positions. In response, each Claimant exercised her seniority to return to a clerical position in the union. Those bids resulted in both Claimants moving from Fort Worth, Texas, to Minnesota in 1996, and they have remained in those clerical positions since that time.

The issue currently in dispute is whether the Claimants occupied positions in 1995 that fell within the terms of the New York Dock Conditions, so that the Carrier was obliged to grant them the benefits under those Conditions. The Carrier submits that the Claimants do not meet the New York Dock tests; the Claimants submit that they do. In addition, the Carrier challenges

the timeliness of both Claimants' claims for these benefits.

The parties were unable to resolve their differences concerning these matters in earlier discussions, and the parties and the arbitrator met for a hearing on April 16, 2002. The parties submitted pre-hearing briefs as well as additional evidence and testimony at the hearing.

RELEVANT CONTRACT LANGUAGE

Article IV of the New York Dock Conditions reads:

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

DISCUSSION AND DECISION

It is undisputed that the ICC's approval of the Carrier's merger in the fall of 1995 was subject to its complying with the New York Dock Conditions. It is also undisputed that the New York Dock Conditions provide certain benefits and guarantees to non-union employees who are adversely affected by merger-related transactions in the railroad industry. The question this case raises is whether the Claimants, as employees adversely affected by the Carrier's merger, fall within the coverage of New York Dock so that they are entitled to its benefits. To answer this question it has been necessary to address the following underlying questions.

1. Who is covered by the New York Dock Conditions?

Although New York Dock could be read literally to extend benefits to *all* non-union employees, subsequent decisions interpreting its terms have persuasively explained that its coverage is not so unlimited. Rather, the key distinction has been whether the unrepresented railroad employee seeking benefits under its terms has occupied a "labor" as opposed to a "management" position. The former would qualify for benefits; the latter would not. It is also noteworthy that a "subordinate official" has been deemed to fall on the "labor" end of the spectrum.

Thus, "rank and file/subordinate official" positions qualify under the New York Dock Conditions, while "official"/"management" positions do not. This case requires determining into which category the Claimants' former positions most clearly fit. That determination in turn determines their eligibility for coverage under New York Dock.

Although the above distinctions are self evident with respect to many positions, that is not always true. In such cases such as this, "It has left to arbitration the exact line to be drawn between these categories." In the Matter of the Arbitration Between Gerald J. Huggins et. al. v. Norfolk & Western Ry. Co. (1985), Harris). A review of prior arbitration decisions that have undertaken this task reveals that there is no single test for making this determination. Instead each case has been decided based upon its unique facts. Nevertheless, from those cases a number of factors have emerged that have consistently been found to be relevant. Guided by those factors, I have found the following evidence to be the most relevant in drawing that line in these two cases.

2. Were Claimant Margaret Ellingson's job responsibilities as Manager, Asset Disposition more clearly rank and file/subordinate official or more clearly management responsibilities?

In determining that the Claimant's job responsibilities as Manager, Asset Disposition were more clearly management than labor/subordinate official responsibilities, I have been most persuaded by the following evidence.

First, although it is true that Ms. Ellingson followed a set routine in putting material out for bids and identifying the highest bidder, the evidence demonstrates that she did exercise judgment and discretion in a way that would not be true for a lower level non-management employee. For example, Ms. Ellingson acknowledged on cross-examination that if a bidder protested the quality of the materials received, she had the ability to weigh the nature of the complaint and determine whether to adjust the final price.

There is also evidence that Ms. Ellingson's immediate supervisor exercised little oversight of her work, while she at least formally shared direct supervision responsibilities over a lower level worker. Moreover, in Ms. Ellingson's former position she reported to a Vice-President; now she reports to a manager.

Ms. Ellingson was encouraged to exercise initiative in her position, and was rewarded

when she did so. Most notably, she was given management level training¹ at the Company's Leadership Training Center, and her last performance appraisal (1994) includes an evaluation of her "Leadership" abilities. This training is different than the "team building" training which lower level employees also attended. Moreover, as a clerk she now no longer receives such training.

Ms. Ellingson's exemplary initiative was acknowledged and rewarded in 1988 when she was given a "long overdue" Chairman's Circle Award of \$1,500. Ms. Ellingson's award was specifically granted in recognition of management-type accomplishments: her development of three major work simplification projects plus additional small projects, as well as her "detailed analysis and tough negotiating." Although scheduled employees are not surprisingly also recognized for outstanding performance, it remains unclear whether they are given this particular award, or comparable cash awards.

Margaret Ellingson argues that the above training and recognition should not be considered in this arbitration because they pre-date the position she occupied in 1995 that has since been eliminated. I cannot agree.

The record demonstrates that in 1987 Ms. Ellingson was promoted to the management ranks when she was appointed Manager in Scrap and Equipment Sales. It was in that position that she was given management training and was awarded the Chairman's Circle Award for her management-type contributions to the Company. Ms. Ellingson acknowledges that this was the very position to which she returned in March of 1992, after her one and one-half year interlude to enhance her skills in an Assistant Material Manager position.² Moreover, it is undisputed that Ms. Ellingson did supervise other employees in these prior positions. It is also undisputed that in late 1994 Ms. Ellingson's position of Manager in Scrap and Equipment Sales was upgraded to a grade 18 and re-titled as Manager, Asset Disposition

This evidence supports the Company's claim that Ms. Ellingson position as Manager, Asset Disposition was a management position both in 1987, when it was titled Manager in Scrap and Equipment Sales, and in 1995 when the ICC approved the merger with the Santa Fe Railroad. It can hardly be argued that evidence of high-level responsibilities between 1987 and

¹ Training included a 1987 Karrass Negotiating Training Program, a 1988 "Coaching and Counseling" workshop for managers and supervisors, and a 1991 "Leadership for the '90s" workshop designed for managers.

² Although Ms. Ellingson's acceptance of this position cannot technically be characterized as a "promotion", it is noteworthy that Vice-President of Purchasing and Management sent her a congratulatory letter on that occasion. Ms.

1994 are irrelevant to the level of Ms. Ellingson's responsibilities when she was upgraded in 1994.

Other evidence that Ms. Ellingson performed managerial duties and exercised managerial responsibilities is found in her 1995 Activity Value Analysis—a document required of substantially all management positions. That Analysis identifies the following accomplishments:

1. Negotiated the sale and managed the delivery of goods and collection of funds for over \$25 million in Company assets, annually.
2. Developed and implemented regional sales contract concept for retired freight cars and trailers deemed unsafe for further movement, resulting in expeditious removal of equipment from Company property along with increased revenue.
3. Built an automated process to track the sale of Company equipment, interfacing with existing company system to generate invoices for collection and removal from asset base.
4. Counseled and assisted legal firm hired to limit the refund requested in connection with a scrap buyer's bankruptcy proceedings, credited by the Company legal staff with the retention of the \$500,000 under consideration.
5. Discovered a vendor's billing mark up in excess of \$100,000 over their subcontractor's charge, prepared comprehensive documentation resulting in the recovery of approximately 70% of the overcharge.

Certainly it is true that Ms. Ellingson—like any employee forced to justify the value of his or her position in the face of looming cut-backs—had a strong incentive to present herself in the most favorable fashion. Nevertheless, the accomplishments cited are largely factual, and are consistent with other evidence concerning the higher-level nature of her duties and responsibilities.

Ms. Ellingson offered evidence that since the Company eliminated her position, clerk-level employees have been performing the work she previously performed. This would be highly relevant if there was evidence that those employees are, in fact, performing the full range of her prior duties. However, such is not the case. The fact that lower level employees are or have been performing the routine tasks of relaying information concerning material to be sold,

Ellingson acknowledged that Vice-Presidents do not send such letters when the rank and file change positions.

and then identifying the highest bidders, fails to demonstrate that they have stepped into Ms. Ellingson's shoes in the most significant respects.

Finally, it is relevant that Ms. Ellingson's job skills—particularly her negotiation and sales skills—are not unique to the railroad industry. Arbitrator Seidenberg has explained the role of skills transferability:

The rationale and history of the benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities. In the Matter of Arbitration Between B.J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

Skills transferability has become a well-accepted factor in evaluating the nature of a position under the New York Dock conditions, and in this case it is a factor that weighs against Ms. Ellingson.

In conclusion, these are the most significant bases upon which I have concluded that Ms. Ellingson's position of Manager, Asset Disposition was more clearly a management than a rank and file/subordinate official position.

3. Were Claimant Diane Suchy's job responsibilities as Manager of Administration more clearly rank and file or management responsibilities?

In arguing that Ms. Suchy's job responsibilities as Manager of Administration were more clearly management than labor/subordinate-official responsibilities, the Carrier has identified Ms. Suchy's own resume as the "best evidence" of her responsibilities. In response, Ms. Suchy took the opportunity to "clarify" those items at the hearing in this matter. Because this resume has become central to decision in this matter, I have weighed each item set forth in it:

Responsible for the administration of the Exempt Salary Administration program and other compensation issues, including promotional, merit and bonus awards.

Ms. Suchy persuasively explained that she prepared a standard letter and other forms and otherwise simply kept records. She had no decision-making authority.

Coordinate the salary grade review process.

Ms. Suchy persuasively explained that she prepared the standard forms and processed the paperwork for others' final approval and files. She had no decision-making authority.

Facilitate the performance appraisal process and handling of development plans and succession planning.

Coordinate the process for internal/external promotional recommendations.

Ms. Suchy persuasively explained that she simply kept records of the positions and ratings of 300+ employees. She had no input into questions of bonuses, merit increases and promotions.

Conduct interviews with prospective clerical/administrative employees

Ms. Suchy explained that she was a member of a team that occasionally pre-screened prospective clerical/administrative employees. This would be consistent with the position of a high level administrative assistant; it would not be an exclusively managerial task. She had no hiring or firing authority.

Coached and counseled employees with work performance and personal problems, in addition to working with EAP Counselors.

Ms. Suchy persuasively explained that her statement refers exclusively to her personal, not professional, involvement with two separate employees who were experiencing personal problems.

Oversee the AAP/EEO Programs and assist with the preparation of department rebuttals to claims and lawsuits.

Ms. Suchy persuasively explained that this was simply a secretarial/record keeping function.

Prepared numerous presentations presented by the System Chief Mechanical Officer, such as labor strategies, Presidential Emergency Board testimony, technical conference papers, facility/ departmental/regional consolidations and reorganizations, equipment acquisitions and budget proposals.

Ms. Suchy persuasively explained that did not prepare any of the

presentations. She simply typed polished them, made overheads, and organized and maintained files on these various items.

Prepare various reports, including mechanical facility FELA costs, System Mechanical monthly goals update, etc.

Ms. Suchy persuasively explained that she simply kept these records and typed standard reports.

Administer BNRR's Tuition Refund Program.

Ms. Suchy persuasively explained that she simply collected these requests, which were approved by section and department heads. She thereafter maintained the employee tuition refund files. She had no decision-making authority.

Coordinate and schedule employee training for various courses, such as those offered by BNRR's Technical Training Center, Arlington Leadership Center, Wharton College, including the development of training schedules for CMT's.

Ms. Suchy persuasively explained that she simply kept records of and scheduled employees for their required training.

Coordinate and participate in department team building initiatives.

Ms. Suchy persuasively explained that she simply coordinated employee participation, made travel and lodging reservations, and attended several team-building sessions (in which scheduled employees also participated). These are not managerial activities.

Administer Employee's Suggestion, Chairman's Circle and Stock Award Programs.

Ms. Suchy persuasively explained that she received the information and forwarded it to others for their signature and submission to the Human Relation Department.

Implemented a "Quality" process for correspondence generated and released by System Mechanical staff.

Ms. Suchy persuasively explained that she prepared a standard letter format, as well as changed the procedure by which the office released correspondence.

Although this activity displays exemplary initiative, it does not go beyond the role of an effective administrative assistant.

Oversee the daily functions of the Administrative and Clerical staff.

Of anything, this is the item that most clearly suggests a managerial rather than a ministerial role. However, it can also be reasonably construed as a liaison role, which would not necessarily qualify this as a management position. This item does not overcome the other evidence concerning this position.

Coordinate strike duty coverage involving System Mechanical employees and facilities.

Ms. Suchy persuasively explained that she simply maintained the strike dusty roster for the System Mechanical staff and made necessary travel arrangements for employees to arrive at their designated assignments.

Represented the Mechanical Department in the Overland Park Office Automation Study, resulting in an annual hard dollar savings of \$315,000 in wages and \$107,000 in equipment rental costs.

Ms. Suchy persuasively explained that she was one of an approximately 25 member team that identified documents and tasks that could be automated through a Xerox workstation. This role would be consistent with that of a capable administrative assistant.

The Carrier's other "best evidence" of Ms. Suchy's responsibilities is the affidavit of the head of her department, who spoke quite highly of Ms. Suchy's abilities and referred to her as his "right-hand" and as "very instrumental in the operation of the office." He describes her as occupying a "decision-making role." However, Ms. Suchy's direct supervisor, the former Director of Financial Planning and Administrative services, has submitted an affidavit in which he states, "I find (Ms. Suchy's) statement to be an accurate description of her responsibilities as Manager, Administrative Services."

Weighing all of the above, I find that Ms. Suchy's position appears most clearly to have been that of a highly responsible administrative assistant rather than that of a manager.

Absent some form of concrete evidence, I am unable to assume that Ms. Suchy had decision-making authority with respect to personnel, budgetary and other managerial matters.

These are the most significant bases upon which I have concluded that Ms. Suchy's position of Manager of Administration was more clearly a subordinate official/administrative assistant/liaison position than a management position.

4. Timeliness

With the above findings, it is unnecessary to determine whether Ms. Ellingson's claim was timely filed. However, I do find that Ms. Suchy's claim was timely.

It is undisputed that on November 21, 1995, Ms. Suchy wrote to the Vice President for the Staffing and Development Department—the same person who had notified her that her position had been eliminated and that she was not being placed in any other exempt position—asking whether she was entitled to receive a displacement allowance under the New York Dock conditions. I find this to be timely notice of her claim.

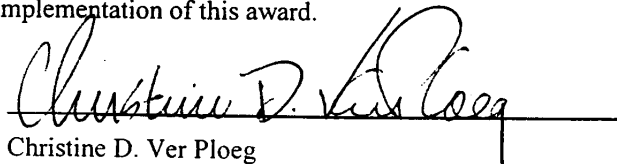
However, it remains disturbing that Ms. Suchy did not further press this claim until 1998. If the Company had shown more than speculative prejudice as a result of this two and one-half year delay, decision on this question may well have gone the other way.

AWARD

For the above reasons I find that Claimant Margaret Ellingson's position as a Manager, Asset Disposition was more clearly a management than a labor position. Thus, she does not fall within the coverage of the New York Dock Conditions.

For the above reasons I find that Claimant Diane Suchy's position as a Manager of Administration was more clearly an administrative assistant rather than a management position. Thus, she fell within the coverage of the New York Dock Conditions and should be given the appropriate benefits under its terms. I will retain jurisdiction of this matter in the event that the parties cannot agree concerning the implementation of this award.

April 25, 2002


Christine D. Ver Ploeg

6

----- X
In the Matter of Arbitration

Between

Southern Railway Company

And

International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers
----- X

FINDINGS AND AWARD

QUESTION AT ISSUE:

Are D. L. Haver and G. L. Galbreath entitled to a
"dismissal allowance" under the New York Dock
protective conditions as the result of their
furlough on September 6, 1985?

BACKGROUND: The two Claimants in the case before the Board occupied Boilermaker positions in the Carrier's Atlanta Diesel Shop. On September 5, 1985 they were furloughed. This is the action which triggered the claim now to be resolved.

Prior to their furlough, the Norfolk Southern Corporation had obtained approval on March 19, 1982 to take control of the Norfolk and Western and the Southern Railways. The approval order included the requirement that New York Dock Conditions apply.

In accordance with the normal procedure, the Parties executed an Implementing Agreement on January 25, 1982. This document provided the particulars of the coordination of certain work and the conditions set forth in New York Dock.

The two claims were submitted to the Carrier by letter dated September 12, 1988. Following an exchange of correspondence, it became clear that the main basis for the claims was the contention that certain repair work of Atlanta based locomotives, as well as modification of some locomotive toilet systems, had been done in the Carrier's Roanoke Shop rather than the Atlanta Shop. The Claimants contended that this deprived them of work and resulted in their furlough. Because the parties could not agree on a resolution of the claims, it was properly progressed to this Arbitration Committee.

FINDINGS: The Board has carefully reviewed and considered the submissions of the parties, the record developed on the property as well as the various holdings on which the parties have relied. The Carrier as a threshold matter, contends that these claims were not filed in a timely manner. The Claimants waited about three years after the occurrence of the events upon which their claims are based before they were submitted to the Carrier. Certainly, the doctrine of Laches has been recognized in this industry as well as by other arbitral precedent to bar claims filed beyond a reasonable time period. The theory underlying the Laches doctrine is that the failure to litigate a claim presently by deferring action until some unspecific but distant time in the future result in bias or prejudice the party against whom the claim is ultimately filed. The purpose of Laches is to bar the submission of

stale claims. Clearly, in employee protective matters, it is critical that claims be filed without delay. In the cases at hand, and while we have fully considered the General Chairman's aggressive and skilled comments before us, the Claimants' failure to act in a timely manner precludes consideration of the issue at hand.

It is to the benefit of both parties to initiate and process claims in an expeditious manner. Often times there is a period of uncertainty with respect to the movement of work between shops following mergers; and, at times, this results in gradual, incremental changes. As a consequence, it may well be difficult to clearly identify the specific time at which the claimed adverse effect became apparent. In other words, there may be a gradual erosion of work which is not readily apparent or easily identified. However, such was not the case here. The Claimants were furloughed on September 6, 1985. As of this date, they state they were placed in a "worse position". One of the Claimants signed his claim on July 20, 1988. The other Claimant signed on August 15, 1988. They gave no reason for waiting almost three years from the time that they claimed to have been put in a "worse position" until the claims were filed. In the circumstances that we find here, such a delay was unreasonable. Therefore, the Board finds that the claims are barred.

AWARD

As specified in the Findings.

G. C. Edwards
G. C. Edwards
Carrier Member

E. Muesig
Eckehard Muesig
Neutral Member

Alan M. Scheer
Alan M. Scheer
Organization Member

Dated: February 13, 1990

7

SPECIAL BOARD OF ARBITRATION

In the Matter of the
Arbitration Between

TRANSPORTATION-COMMUNICATIONS
INTERNATIONAL UNION,

Organization,

and

NORFOLK AND WESTERN RAILWAY
COMPANY,

Carrier.

OPINION AND AWARD

Pursuant to Article XI
of the January 8, 1979
Memorandum Agreement as
Amended by the November 11,
1986 Memorandum Agreement

Case No. 23
Award No. 23

Hearing Date: January 11, 1990
Hearing Location: Norfolk, Virginia

MEMBERS OF THE BOARD

Employees' Member: J. C. Campbell
Carrier Member: G. C. Edwards
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. Carrier violated the terms of the January 8, 1979 Memorandum Agreement, as amended, particularly but not limited to Articles I and V when Carrier failed consider Clerk J. O. Barnett an adversely affected and protected employee entitled to a displacement allowance based upon the position of Supervisor Foreign Per Diem starting at \$2,475.71 per month commencing August 1986 to February 1989 and continuing monthly thereafter.

2. As a result of said violation, Carrier shall be required to consider Clerk J. O. Barnett an adversely affected and protected employee entitled to a displacement allowance based upon the position of Supervisor Foreign Per Diem starting at \$2,475.71 per month commencing August 1986 to February 1989 and continuing monthly thereafter for a five (5) year period.

CARRIER'S STATEMENT OF THE CLAIM

Claim of Clerk J. O. Barnett for a displacement allowance under the January 8, 1979 Memorandum Agreement for the month of August, 1986 and continuing based on the rate of the position of Supervisor Foreign Per Diem, Car Accounting Department, Roanoke, VA.

OPINION OF THE BOARD

This Special Board of Arbitration (Board), formed pursuant to Article XI of the January 8, 1979 Memorandum Agreement (Agreement), as amended on November 11, 1986, between the Organization and Carrier finds, after hearing upon the whole record and all evidence, that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the parties and subject matter of the dispute herein; that this Board is duly constituted pursuant to a February 19, 1985 appointment letter; and that all parties were given due notice of the hearing held in this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

On July 2, 1985, the Carrier issued a bulletin advertising Position 18449, Supervisor Foreign Per Diem in the Roanoke, Virginia, Car Accounting Office. Claimant, who held an October 18, 1966 seniority date on District No. 1, bid on the job. On July 11, 1985, the Carrier awarded the Supervisor Foreign Per Diem position to Clerk W. I. McIlvraith, an employee with less seniority than Claimant. Claimant grieved. His claim challenging the Carrier's disqualification of his bid was progressed to Public Law Board No. 3849 (Huessig). In Award No. 29, dated September 28, 1988, Public Law Board No. 3849 sustained the claim ruling that Claimant should have been placed on the Supervisor Foreign Per Diem position as of July 11, 1985.

From 1986 to 1988, Claimant occupied various positions in the Car Accounting Department at Roanoke. In late June, 1988, he exhausted his seniority on District 1 and so he cross-displaced to Norfolk Southern District 4. Meanwhile, due to the permanent abolishment of a position, a worker senior to both Claimant and Clerk McIlvraith displaced the latter from the Supervisor Foreign Per Diem position on August 1, 1986. The Carrier recognized that Clerk McIlvraith was adversely affected by the abolishment of a permanent position and has paid him the appropriate displacement allowances computed on the rate of the Supervisor Foreign Per Diem position.

After Award No. 29 was issued, the Carrier attempted to compensate Claimant for the difference between the rate of the Supervisor Foreign Per Diem position and the rate of the positions he occupied for the period from July 11, 1985 through July 31, 1986. Claimant rejected the Carrier's payment for retroactive earnings contending that, to fully satisfy Award No. 29, the Carrier must also pay him a displacement allowance for five years from August 1, 1986 predicated on the rate of the Supervisor Foreign Per Diem position. Denying the Organization's request for an interpretation of Award No. 29, Public Law Board No. 3849 held,

on June 20, 1989, that Claimant's request for protective pay under the January 8, 1979 Memorandum Agreement was an issue which must be brought to another forum (this Board).

During March, 1989, Claimant filed the appropriate forms claiming protective benefits based on the rate of the Supervisor Foreign Per Diem position for the months of August, 1986 through February, 1989. Thereafter, Claimant filed similar applications for protective benefits for each ensuing month.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Organization's primary argument is that but for the Carrier's violation of the working agreement, Claimant would have occupied the Supervisor Foreign Per Diem position at the time that a senior clerk displaced to the job on August 1, 1986. At that point, Claimant accrued an entitlement to an Article V displacement allowance comprehending the rate of the Supervisor Foreign Per Diem position. The Carrier cannot profit from its contract violation. Compensating Claimant with the protective benefits makes him whole for the Carrier's failure to award him the Supervisor Foreign Per Diem position.

Alternatively, the Organization argues that the Carrier breached Article I of the January 8, 1979 Memorandum Agreement because it failed to notify Claimant of his entitlement to protective benefits when Public Law Board No. 3849 issued Award No. 29. Absent such notice, Claimant timely filed a claim for protective benefits shortly after Public Law Board No. 3849 ruled that he was entitled to the Supervisor Foreign Per Diem position. Contrary to the Carrier's contention, the Organization points out that, under Article V, Section 4, a protected employee need not actually occupy a position to gain a protected rate premised on the rate of the unoccupied position.

Next, the Organization emphasizes that it is not urging this Board to undo the chain of displacements occurring after August 1, 1986. It is merely asking this Board to pay Claimant benefits he would have received as the Supervisor Foreign Per Diem. While the Carrier may not recoup the displacement allowances it has paid Clerk McIlvraith, it may discontinue such payments once it pays Claimant retroactive benefits. Then, it is obligated to pay Claimant the appropriate allowance for the duration of Claimant's protective period.

B. The Carrier's Position

The Carrier raises three defenses.

First, Claimant failed to file a claim within the thirty day time limit set forth in Article XIV of the January 8, 1979 Memorandum Agreement. Claimant first filed his claim for protective benefits on March 8, 1989, more than two years and seven months after the incumbent was displaced from the Supervisor Foreign Per Diem position.

Second, the doctrine of laches bars the claim since Claimant slept on his rights for more than two years. Claimant cannot be rewarded for neglecting his rights. The claim is stale and antiquated. Since the Carrier has already paid an allowance to another protected clerk premised on the rate of the Supervisor Foreign Per Diem position arising from the August 1, 1986 displacement, the Carrier cannot be held liable for a duplicate payment to another employee.

Third, Article V, Section 1 of the January 8, 1979 Memorandum Agreement contemplates that to receive a displacement allowance, a protected employee must be the incumbent of either the position abolished or a position to which a senior employee displaces as a result of the permanent abolition of another position. Otherwise, the employee has not been "adversely affected." As of August 1, 1986, Claimant was not the Supervisor Foreign Per Diem. Indeed, he never occupied the job. Award No. 29 did not alter the eligibility criteria contained in the January 8, 1979 Memorandum Agreement since Public Law Board No. 3849 lacked jurisdiction to interpret and apply the Agreement.

III. DISCUSSION

The issue in this case is whether or not Claimant, for purposes of applying the January 8, 1979 Memorandum Agreement, should be retroactively treated as occupying the Supervisor Foreign Per Diem position because the Carrier improperly rejected his bid for the position in July, 1985. The record reveals that but for the Carrier's breach of the working agreement, Claimant would have been assigned the position. At the onset, it is important to note that the remedy in Award No. 29 was restricted exclusively to the Carrier's breach of the working agreement. Any right Claimant has to protective benefits under the January 8, 1979 Memorandum Agreement is independent of his rights under the working agreement. Because we are presented with a separate protective issue, the language in Award No. 29 cannot be construed as automatically allowing this claim.

The first question presented to this Board is whether Claimant timely initiated a claim for protective benefits.

Article XIV imposes a strict thirty day time limit for affected workers to file for protective benefits but the January 8, 1979 Memorandum Agreement imposes a reciprocal obligation on the Carrier to notify employees of their eligibility for benefits. Since the Carrier never tendered Claimant such notification, he was not obligated to file his claim within thirty days. Nevertheless, we also find that the Carrier did not breach Article I by failing to notify Claimant because it satisfied its contractual obligation by (presumably) serving a notice on Clerk McIlvraith. The Carrier cannot possibly tender two notices to two protected employees concerning a single displacement. If the Carrier had failed to notify Clerk McIlvraith of his eligibility for protective benefits premised on the rate of the position Supervisor Foreign Per Diem in August 1986, the Organization surely would have filed a claim on behalf of Clerk McIlvraith.

Although Claimant was not obligated to comply with the strict thirty day time limit in Article XIV, he was under a duty to commence his claim within a reasonable time to prevent prejudice to the Carrier. The doctrine of laches bars an employee from resurrecting a stale claim when the Carrier detrimentally relies on the employee's procrastination. Claimant cannot contend that his right to protective benefits first arose when Award No. 29 was issued. Claimant, who was working in the Car Department, was obviously aware of the August, 1986 displacements. Therefore, Claimant should have initiated a claim for protective benefits within a reasonable time after an employee senior to Claimant displaced onto the Supervisor Foreign Per Diem position. Instead, Claimant waited for more than two years and seven months before initiating a formal protective benefit claim. The delay prejudiced the Carrier because the Carrier was paying a protective allowance based on the rate of the Supervisor Foreign Per Diem position to the displaced junior incumbent. If the Carrier had been placed on notice that Claimant was asserting a claim to protective payments being paid to another employee, the Carrier could have opted to discontinue paying Clerk McIlvraith. In essence, the Organization is improperly imploring us to completely undo a series of displacements and years of protective payments to provide benefits to an employee who inexplicably failed to timely raise a claim for protective benefits.

Since we find that the claim was barred by laches, we need not consider or address the Carrier's argument that Claimant was ineligible for protective benefits based on the rate of Supervisor Foreign Per Diem position since he did not actually occupy the job when the junior incumbent was displaced by an employee with greater seniority than Claimant as a result of the abolishment of a permanent position.

AWARD AND ORDER

claim dismissed.

Dated: June 20, 1990

J. C. Campbell
J. C. Campbell
Employee's Member

G. C. Edwards
G. C. Edwards
Carrier Member

John B. LaRocco
John B. LaRocco
Neutral Member

