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205542

June 3, 2002

ENTERED
Office of the Secretary

JUN 04 2002

Part of
Public Record



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

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 Claimant's Reply to Carrier's 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.

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

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

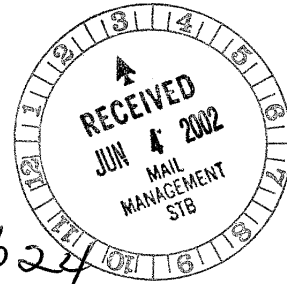
Walter Hodynsky

Walter Hodynsky

WH/dlc

cc: Lisa M. Harrison, Esq. (w/enc.)
Diane Suchy (w/enc.)

SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 32549 - Sub 24

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

CLAIMANT'S REPLY TO CARRIER'S
PETITION FOR REVIEW OF ARBITRATION AWARD

ENTERED
Office of the Secretary

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Public Record

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Attorney for Claimant Diane Suchy

June 3, 2002

ISSUES PRESENTED FOR REVIEW

1. Does the Surface Transportation (STB) have authority to consider the Carrier's Petition for Review of Arbitration Award regarding claimant Diane Suchy issued on April 25, 2002, under Article 1, §11 and Article 4 of the New York Dock Conditions pursuant to 49CFR §1115.8?
2. Should the Board answer the preceding question in the affirmative and proceed to consider the Carrier's Petition for Review, then does the two year statute of limitations under 49 USC §11705(c) apply to claims for employee protection brought under Article 1, §11 and Article 4 of the New York Dock Employee Protective Conditions?
3. Does the equitable Doctrine of Laches apply to Diane Suchy's claim for New York Dock Employee Protective Benefits brought under Article 1, §11 and Articles 4 thereof?

STATEMENT OF THE CASE

As set forth in Carrier's Statement of the Case, this matter involves the Carrier's request for the Surface Transportation Board to review and set aside the arbitration decision issued in favor of claimant Diane Suchy by Arbitrator Christine Ver Ploeg on April 25, 2002 awarding her benefits under the New York Dock Employee Protective Conditions. The claim was precipitated by claimant being advised by Vice President James Noel on November, 1995 that her position of Manager Administration in the Mechanical Department was abolished effective December 31, 1995. (See Claimant's Exhibit No. 1). Shortly after receiving said letter, claimant Suchy sent a letter back to Vice President Noel inquiring about her eligibility to receive a displacement allowance under the New York Dock Employee Protective Conditions. (See Carrier's Exhibit No. 1). In addition thereto, however, claimant Suchy stated in her letter to Vice President Noel

that if the Carrier determined that she was not entitled to a displacement allowance, it was her "desire to elect a dismissal allowance as defined in Article 1, Section 1C, for the duration of the six (6) year protected period." In a footnote at the bottom of page 2, to its brief, the Carrier maintains that claimant's counsel "did not produce the Nov. 1995 letter until March 21, 2002." Obviously, however, the Carrier had said letter since it was originally written, as evidenced by Director of Labor Relations Wendell Bell replying thereto in place of Mr. Noel on December 14, 1995. (See Carrier's Exhibit No. 3). To one reviewing the first paragraph of said reply by Mr. Bell, it is clear that the Carrier understood the letter to be a presentation of claimant Suchy's claim: "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." (emphasis added) Mr. Bell then went on and stated reasons why he found Ms. Suchy was not covered by the New York Dock Protective Conditions. He then stated that "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." (emphasis added)

Thus, both the claimant believed and the Carrier accepted the letter of November 21, 1995 as a claim for New York Dock Employee Protective Benefits. As such, Carrier is plainly in error in maintaining now at page 3 of its brief that "Ms. Suchy did not submit a formal claim for New York Dock benefits until June 29, 1998 more than two and one-half years after her exempt position was abolished." This was made clear in the first paragraph of claimants counsel's letter of June 29, 1998 to Director of Labor Relations Wendell Bell wherein it was stated: "We have

been retained by Ms. Diane L. Suchy to represent her in her claim for benefits under the New York Dock Employee Protective Conditions to which she is entitled to..." (See Carrier's Exhibit No. 4). As such, said letter served to progress the original claim submitted by Ms. Suchy on November 19, 1995. The fact, however, that Ms. Suchy did not in her letter request Arbitration and her counsel did if the claim was not allowed clearly is not disposition of the matter. Indeed, in Article 4 of the New York Dock Employee Protective Conditions, it is stated that if the claim could not be settled "within 30 days after the dispute arises, either party may refer the dispute to Arbitration." (emphasis added) By merely presenting the claim, Ms. Suchy was not aware of the Carrier's response and after 30 days, if the response were negative, she could clearly refer the matter to Arbitration though, in fact, she did not have to.

Nevertheless, Arbitrator Ver Ploeg in her Award at page 12 realized that "Ms. Suchy's letter of November 21, 1995 to Vice President Noel was timely notice of her claim." As such, when the Carrier raised the issue of timeliness, it had an opportunity to fully argue in writing and in oral presentation its position, but failed to persuade the Arbitrator that the claim was not timely presented. In addition thereto, the Carrier also had the same opportunity to progress its laches argument which too was considered by Arbitrator Ver Ploeg and was rejected.

Interestingly enough, the Carrier first raised the issue of time limits and that of laches in its letter of April 27, 1999 to claimant's counsel. (See Claimant's Exhibit No. 2). Claimant's counsel, in his reply of May 3, 1999, pointed out that these arguments were first made nearly one year after claimant's counsel further progressed the claims to Mr. Bell. (See Claimant's Exhibit No. 3). Furthermore, claimant's counsel pointed out that there were no applicable time limits to be followed under the New York Dock Employee Protective Conditions and that the doctrine of

laches had no application to these claims. The Carrier then only reiterated its position in correspondence from Attorney Stroik to claimants' attorney in a letter dated May 25, 1999. (See Claimant's Exhibit No. 4). The Carrier did not then further raise the issue, thereby either dropping the matter or accepting claimants response, until the arguments were again made in the Carrier's Arbitration Brief for the New York claims. However, the argument was not found persuasive by Arbitrator Ver Ploeg as evidenced by her decision in this case. The same result should be reached by the Surface Transportation Board with it finding no basis to consider either argument at this time.

**THE BOARD IS WITHOUT AUTHORITY TO REVIEW A FINAL AND BINDING
ARBITRATION AWARD UNDER THE NEW YORK DOCK EMPLOYEE
PROTECTIVE CONDITIONS.**

The Carrier has requested the Board to review Diane Suchy's Award pursuant to 49 C.F.R. § 1115.8. Though said provision addresses petitioner to review arbitration decisions and provides that "an appeal of right is permitted", claimant respectfully submits that it has no application in this case. After all, what the Carrier wishes the Board to do is to review the Arbitration Award issued under Article 1, §11 and Article 4 of the New York Dock Employee Protective Conditions. However pursuant to Article 1, §11(c) the decision of an arbitrator under New York Dock Employee Protective Conditions "shall be final, binding and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed." Thus, a final, binding and conclusive Award was issued by Arbitrator Ver Ploeg on April 25, 2002. In that Award, the Arbitrator made clear that she had considered both the timeliness argument and the laches argument made by the Carrier in its brief to the Board. With respect to the former, the Arbitrator specifically found the claim to be timely presented and

with respect to the latter held that laches did not apply in that case. As such, the Carrier had full opportunity to argue and present both issues to the Arbitration Board which considered the same and rejected them. It would be expected that once the Arbitrator had issued her award, having addressed those issues, it would be final, binding and conclusive as set forth in Article 1, §11(c) of the New York Employee Protective Conditions. The Carrier now, however, would now wish to have "a second bite at the apple", not having prevailed the first time. This Board, however, should not permit the same and recognize the finality of the Arbitration Award issued under the New York Dock Employee Protective Conditions involving claimant Suchy.

The Carrier, however, maintains that under 49 C.F.R. §1115.8, "the Board will review arbitrations awards when faced with recurring or otherwise significant issues of general importance regarding the interpretation of our labor practice conditions." It cites in support thereof Chicago & North Western Transp. Co. - Abandonment - Near Dubuque and Olewein, IA, 3 I.C.C.2d 729, 736 (1987) ("Lace Curtain"). However, it is significant that the Carrier has not otherwise demonstrated or proven that the time limits which it has issued in this case is a "recurring or otherwise significant issue of general importance regarding the interpretation of our labor practice conditions." The burden proof in doing so, however, clearly rests on the Carrier, which has failed to meet that burden in this case. Indeed, it would appear that the time limits issue was an isolated one raised for the first time regarding claims Suchy as well as Ellingson previously heard by Arbitrator Ver Ploeg. In that regard, it is most interesting to note, as is set forth in claimant's spreadsheet, (See Carrier's Exhibit No. 2), that there were at least four other claims presented on behalf of BSNF employees whose jobs were abolished in 1995 or 1996 and who did not file claims until 1998. In those instances the Carrier not only failed to argue time

limits, but the claims were ultimately allowed and settled. This only all the more indicates that in the original arbitration where the Carrier raised the argument, it was a fall back position which was not aggressively advanced on the property as well before the Arbitrator. Now, however, that the Carrier has lost on the merits, it has pushed the issue to the forefront and attempts to "boot strap" itself to a review before the Service Transportation Board. Obviously, the Board should recognize this play for what it really is and reject Carrier's Petition for Review outright.

Thus, from the foregoing, it is clearly evident that the Carrier errors in its statement on page 6 of the brief that "The Suchy Award fails to address the timeliness issue either in terms of the statute of limitations or under the doctrine of laches." Equally unconvincing is Carrier's argument that the Suchy Award "raises important issues concerning the implementation of an agreement imposing labor protective conditions." Apparently those "important issues" involve the issue of time limits when the "agreement fails to specify a time period for filing claims."

However, this is not wholly unexpected for three significant reasons:

1. If no time limits are specified in an implementing agreement, it is to be presumed there are none.
2. There are no time limits under the New York Dock Employee Protective Conditions.
3. If the parties intended that there should be any time limit provisions, they would either have been included in the implementing agreement or clearly set forth in the actual New York Dock Employee Protective Conditions.

Thus, based on the foregoing reasons, claimant respectfully submits that the Carrier's petition to review the Suchy Award is neither appropriate under the C.F.R. 1115.8 or the Lace

Curtain Standard. As such, the petition of the Carrier should be dismissed on its face. Claimant respectfully request the Board to so find.

II. THE GENERAL TWO YEAR STATUTE OF LIMITATIONS FOR FILING COMPLAINTS WITH THE BOARD FOUND IN 49 U.S.C. §11705(c) HAS NO APPLICATION TO THE CLAIMS UNDER THE NEW YORK DOCK PROTECTIVE CONDITIONS.

If the Board finds that it has authority to consider the Carrier's Petition for Review of the Suchy Award, claimant respectfully submits that there is no basis to set aside the Award under 49 U.S.C. §11705(c). In that regard, the Carrier is plainly in error in maintaining that "application of this general statute of limitations is mandated. Both by a plaintext reading of the relevant statutory provisions and by judicial precedent." As will be seen below, neither mandates this result.

To being with, however, it must be emphasized there are no time limits for filing claims under the New York Dock Employee Protective Conditions. In fact, this is clearly recognized on the Carrier's property. See in this regard Award of Arbitration Committee under New York Dock Employee Protective Conditions, BRC and Burlington Northern Railway Company (Marx). In said Award, the Carrier attempted to maintain that the general Time Limit on Claims Rule 34A of the Carmen Schedule Agreement applied because the claim was not presented within sixty (60) days from the date of occurrence and, therefore, it was barred. Arbitrator Marx, however, was not persuaded and found that "§11 provides no time limits for disputes under other sections. Since the parties have accepted the New York Dock Conditions in reference to the merger protection matters, it follows that §11 is also the only guide for resolution by arbitration of such matters." (See Claimant's Exhibit No. 5).

Perhaps more telling is the earlier statement of Director of Labor Relations for BNSF Wendell Bell, who in his letter of September 18, 1996 to the claimants' representative concerning other claims brought on behalf of former management employees, wherein it was argued that the Carrier had failed to timely reply, stated unequivocally that:

"As you are very well aware, there are no time limits in those Conditions, and so certainly, no 'payable is presented' venue for alleged breach of such non-existent time limits. I find it more than a little surprising that you would even bother to raise such a worthless point." (See Claimant's Exhibits No. 6).

The Carrier, not finding any time limits to support its argument in the New York Dock Employee Protective Conditions, is attempting to invent the same by relying upon 49 U.S.C. §11705(c). The language of §11705(c) provides "a person must file a complaint with the Board to receive damages under §1704(b) of this title within two years after the claim accrues." Then, referring to §11704(b) it is stated therein that "a rail Carrier providing transportation subject to the jurisdiction of this Board under this part (49 U.S.C. §10101) is liable for damages sustained by a person as a result of an act or omission of that Carrier in violation of this part (49 U.S.C. §10101 et. seq.).

Thus, contrary to the Carrier, reference in §11704(b) is to 49 U.S.C. §10101 and not part A of title 49 §10101 of title 49 involves rail of transportation policy for the U.S. under the Interstate Commerce Act. And, while it is included in part A of title 49 and the New York Dock Employee Protective Conditions are issued thereunder, it does not necessarily imply that the general two year statute of limitations found in §11705(c) applies also to the New York Dock Employee Protective Conditions. Indeed, if they did, this would be referenced either in the Employee Protective Conditions or in the statute itself. Instead, these are sections which deal

with transportation issues addressing the situation where a shipper who is using the railroad to transport his or her goods sustains damages and has a claim against the railroad as a result. Consequently, it is quite clear that the time limits therein, would apply to the shipper bringing an action against the Carrier and not employees for benefits under the New York Dock Employee Protective Conditions. Otherwise, it would be to stretch the language of U.S.C. §11704(b) in the breaking point, reading into that section something that plainly is not there.

Thus, “the plain text reading of the above statute does not provide support for the Carrier in this case. Nor is there 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.” In that regard, it is interestingly to note that the Carrier has failed to cite even one single solitary Arbitration Award which found that the two year statute of limitations in §11705(c) applies to New York Dock Employee Protective Conditions. Rather, the Carrier cites one isolated court opinion, Modin vs. New York Cent. Co., 650 F.2d 829, 834 (6th Cir. 1981) to support its position. However, when that case is carefully considered, it is clear that it provides no support to the Carrier's position that the claimant had two years to submit a claim for benefits of the New York Dock Employee Protective Conditions of 49 U.S.C. §11705(c), requiring that it be disregarded on its face.

To begin with, Modin, supra does not involve New York Dock Employee Protective Conditions at all. The case deals with the conditions imposed by the I.C.C. in the particular as referenced therein. Second, rather than involving an arbitration situation it involves a the civil suit that was filed untimely in the U.S. District Court. Consequently, for the foregoing reasons, Modin v. New York Cent. Co., supra, does not provide the support for its position in this case claimed by the Carrier. As previously indicated, the statute has been applied to situations where

claims have been brought against the Carrier for failure to deliver goods, spot cars, apply appropriate tariffs, and writing reports. This certainly does not apply to the New York Dock claims progressed by employees against the Carrier. In any event, as was previously argued, and found by Arbitrator Ver Ploeg, the claimant in this case did timely file her claim and therefore could not be any violation of the two year statute of limitations even if it applied which it clearly does not.

Thus, the claimant respectfully submits that even if the Board found authority to consider the Carrier's Petition for Review of the Suchy Arbitration Award, the two year statute of limitations found in 49 U.S.C. §11705(c) has no application to New York Dock Employee Protective claims and therefore could not serve to invalidate the claim of Diane Suchy even if it had been filed, as the Carrier maintains, two and one-half years after the position was abolished. But again, as previously stated, her claim was filed sooner than that and was found to be timely by the Arbitrator hearing the case. The Award should not, therefore, be set aside on this ground. The claim was not untimely progressed and there are no time limits governing that we filed under the New York Dock Employee Protective Conditions:

III. THE DOCTRINE OF LACHES HAS NO APPLICATION TO DIANE SUCHY'S CLAIM.

The Carrier at page 9 of its brief refers to Arbitrator Ver Ploeg's comments on page 12 of the Award respecting the issue of laches. She wrote therewith stating, "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."

Clearly, with respect to those two sentences from the Award, the Carrier attempts to read much more than what is actually there. In the first sentence, the Arbitrator merely reaffirms the proceeding paragraph that the claim was timely filed but there was a delay in progressing claim which was of concern to the Arbitrator. However, in reviewing the entire circumstances, the Arbitrator states in the second sentence, the Carrier had not established prejudice but implies that if it had, "the decision on this question may well have gone the other way." The language of the Award does not state, however, shall have gone the other way. Thus, the Carrier in stating that the Arbitrator by using the word "disturbing compels the conclusion that the delay was unreasonable and prohibits her claim on timeliness grounds", place words in the Award that plainly are not there.

At page 10, the Carrier raises the argument yet another level by maintaining that "this ruling was egregious error because Southern Ry. establishes a long delay in pursuing a claim for protective benefits results in per se prejudice." The ruling of Arbitrator Ver Ploeg, however, was neither a egregious error or as the word is used does it rise to the level of finding per se prejudice to Carrier. Quite to the contrary, the burden remains upon the Carrier not only to show prejudice, but that a delay in filing the claim was unreasonable and unexplained. In this case was neither.

In support of its position, the Carrier cites the arbitration between Southern Ry. and IBB, (Muessig) as well as in re Arbitration TCU and Norfolk & Western Ry. (LaRocco 1990). The former Arbitration Award can be distinguished on its facts that the claimants waited three years without any explanation for filing their claims. The Arbitrator there applied laches, stating that "in the circumstances we find here such a delay inconceivably most certainly does not hold that a long delay in pursuing a claim for protective benefits results in per se prejudice." As for Arbitrator

LaRocco's Award, was also relied upon the Carrier, the Arbitrator found there was prejudice to the Carrier in as much as the Carrier was already paying one employee a protective rate and, therefore, allow the protective benefits another employee (claimant) would "completely undo a series of displacements in years and protective payments to provide benefits to an employee who inexplicably had failed to timely raised a claim for protective benefits." Obviously, no such prejudice has been shown by the Carrier in this case.

Indeed, in this instance the Carrier attempted to show prejudice by stating that the records were no longer available and that it would not present Mr. Bauer as witness to testify "on the nature of Ms. Suchy's managerial duties because he is retired." As to the former, Carriers own records retention policy requires that all records of this nature be kept for at least six years and that if they were destroyed prematurely, then the fault lies solely with the Carrier and not the claimant. (See Claimant's Exhibit No. 7). And, as for any witnesses that the Carrier may have wished to produce at the hearing, prior thereto, Carrier made it amply clear to the claimant's counsel that the affidavits which were submitted for Ed Bauer and others was submitted in lieu of their appearances at the hearing. In any event, if the Carrier could locate these retired former employees for purposes of requesting and securing written affidavits, they most certainly could have been located and requested to testify at the hearing, although their testimony would have added very little if anything; their testimony would have merely corroborated what was already presented in the witnesses' written statements. Therefore, the absence of the written documents or the witnesses themselves did not serve to prejudice the Carrier at the hearing. No prejudice was shown much less was it actually established to have occurred for these reasons. In that regard, particularly enlightening is the holding of Referee Von Hays in Award No. 1 of Public

Law Board 574 Wally Masia, CSX Transportation, Inc. United Transportation Union, concerning

what was really needed to show prejudice in the case:

“Any delay in asserting a contractual right does not constitute laches or waiver per se; the passage of an inordinate amount of time without enforcement action must be affirmatively proven to have been intentional, and to have precipitated detrimental reliance (prejudicial change in position) by the movant (organization). This combination of circumstances when conclusively proven, can justify the granting of relief, provided such relief is not barred by statute or contract.”

It should be noted, however, that the doctrine of laches is not easily applied in the context of railway labor arbitration in general and in the New York Dock Employee Protective Conditions, in particular. With respect to the former, in Award No. 14, Public Law Board 382 UTU(E) vs. Delaware and Hudson Railway Company, (July 30, 1974), Referee Nicholas Zumas held as follows:

“Finally, with respect to Carrier’s defense of “laches” the Board finds that it is without merit. The doctrine of “laches” had its genesis in the courts of equity and evolved as one of the many remedies created by the equity chancellors as a means of rectifying the “action at law” deficiencies. It was and is a unique and seldom applied concept utilized only in extraordinary circumstances. This record does not warrant the application of the doctrine of “laches”. (emphasis added) (See Claimant’s Exhibit No. 8)

And finally, concerning the application of laches under the New York Dock Employee Protective Conditions, enlightening is Aware No. 4, UP vs. TCU, dated February 28, 1989. (See Claimant’s Exhibit No. 9). There Referee Stallworth was also presented with an argument of laches from the Carrier concerning several non-agreement employees affected by the transaction, who had filed claims, some up to four years after being affected. The Carrier invoked the concept of laches and tried to convince the referee that a reasonable time limit under New York Dock to bring an action would be 90 days. Initially the Arbitrator found that “The Carrier concedes, as it

must, that there is no precise period for filing claims which is stated in the New York Dock Conditions.” He then pointed out that due to the Carrier’s failure to grant the benefits to non-agreement employees this “can be viewed as a continuing violation” for which, presumably, a claim could be brought at any time during the six year protection period. And, Arbitrator Stallworth refused to apply the concept of laches in the dispute, noting that “the Carrier has not pointed to a single case in which laches has been applied to block New York Dock claims, except perhaps where the parties had a well-established past practice establishing a certain time limit.” There is no such time limit on this property either.

CONCLUSION

Thus, for the reasons stated above, claimant respectfully submits that the doctrine of laches was not violated, much less does it have any application in this particular case. As such, the claim being timely filed and laches not applying, there is no basis for the Board to set aside Arbitrator Ver Ploeg’s Award or if it had the authority to do so, claimant respectfully submits that the Board is without authority to review and set aside the arbitration decision issued by Arbitrator Ver Ploeg under Article 1, §11 and Article 4 of the New York Dock Employee Protective Conditions. Under those conditions the Award that was issued is final, binding and conclusive and has to be accepted by all parties, rather the utilizing collateral efforts to set aside the Award, especially when those efforts are based upon arguments that have fully considered, reviewed and the rejected by the Arbitrator in the decision. Otherwise this would set an extremely dangerous precedent for such Awards under the New York Dock Employee Protective Conditions would never be final and always subject to review and reversal at the whim of losing party, whether it be the Carrier or the claimant. It would not do justice to the purpose of the Employee Protective

Conditions or to the arbitration procedures established therein for those employees, whether they be scheduled or not scheduled, to have those claims inappropriately handled under the terms of those conditions.

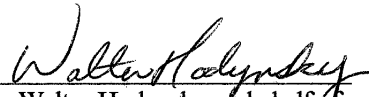
Without waving the foregoing, should the Board conclude that it does have authority to review Arbitrator Ver Ploeg's Award in this case involving claimant Suchy, for reasons set forth in claimant's brief, it is clear that there is now basis for setting aside the Award on the grounds cited by the Carrier. In that regard, Ms. Suchy's claim was timely presented and therefore, the statute of limitations under U.S.C. §11705(c) has no application in this case. And, even if it were found that the claims were not actually presented until the year of 1998, the statute of limitations found therein would not apply as it clearly governs complaints against the Carrier and not for claims of employees under the New York Dock Employee Protective Conditions.

Also, for the reasons previously stated, the doctrine of laches would have no application in this case to bar Ms. Suchy's claim as it was not actually presented until June, 1998, but rather was progressed having been originally presented in November, 1995. In that regard, the Carrier has not met its burden of proof in showing that two and one-half year delay in this particular case was unreasonable and extreme length of time under the circumstances prejudicial to the Carrier. Or, as the Arbitrator had found, the Carrier had shown nothing more than "speculative prejudice" in this case.

Thus, for the reasons stated, Carrier's Petition for Review of Arbitration Award should be denied on its face and even if considered, since the Carrier has not shown any basis for setting it aside, and the Award should be allowed to stand and we respectfully request the Board to so find and order the Carrier to comply therewith.

Dated this 3rd day of June, 2002

Respectfully Submitted,
HEYWOOD & CARI, S.C.

A handwritten signature in cursive script, appearing to read "Walter Hodynsky", written over a horizontal line.

By: Walter Hodynsky on behalf of
Claimant Diane Suchy
Heywood & Cari, S.C.
1200 Hosford St., Suite 106
P.O. Box 125
Hudson, WI 54016
(715) 386-5551

CLAIMANTS EXHIBITS

1. Vice President James Noel's letter of Nov., 1995 to claimant advising of job abolishment
2. Attorney Lawrence Stroik's letter of April 27, 1999 to Attorney Hodynsky on the issue of time limits and laches.
3. Attorney Hodynsky's letter of May 3, 1999 to Attorney Stroik.
4. Attorney Stroik's letter of May 25, 1999 to Attorney Hodynsky
5. Arbitration Award under New York Dock Conditions, Appendix III, Sec. 11 BRC v. BN (Marx)
6. Director Wendell Bell's letter of September 18, 1996 to Attorney Hodynsky concerning the issue of time limits in New York Docks claims
7. BNSF Records Destruction Policy
8. Award Number 14 of PLB 382 UTU(E) v. D & H Railway, July 30, 1994 (Zumas)
9. Cases 4, U.P. v. T.C.U., August 18, 1988 (Stallworth)



BURLINGTON NORTHERN RAILROAD

JAMES L. NOEL
Vice President
Staffing and Development

3000 Continental Plaza
777 Main Street
P.O. Box 961030
Fort Worth, Texas 76161-0030
Telephone (817) 333-7409

- 35

PERSONAL & CONFIDENTIAL

Ms. Diane L. Suchy
5513 Cedar Breaks Drive
Fort Worth, TX 76137-4444

Dear Ms. Suchy:

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 of both companies' workforces.

Many positions have been eliminated and you have not been placed in an exempt position. BN has provided a separation package designed to assist you in your pursuit of another career or other interests.

To ease this transition, you will be kept on the payroll until December 31, 1995, but not required to report for assignment after today. You will also be enrolled with an outplacement firm to begin transitional counseling. We strongly encourage you to take advantage of all the services the outplacement firm can offer you during this period of adjustment.

By December 31, 1995, you will need to choose one of the following alternatives and inform me of your decision.

1. Sign the attached Release and receive a separation payment in the gross amount of \$55,637.87. This payment will be sent to you within 20 days of your last day on the payroll. In addition, the Company will pay the premiums for continued medical coverage under COBRA for up to a six-month period or until you are covered by another group insurance plan, whichever is sooner. At the end of six months, you will have the opportunity to continue your coverage under COBRA for an additional 12 months at your own expense. **You are advised to consult with an attorney prior to signing the Release.**
2. If you have seniority rights, you may elect to exercise those rights and receive no separation payment. If this requires a move, BN will provide for some relocation benefits to the location where you have union seniority according to the provisions of the BNSF Relocation Policy, a copy of which is enclosed. If you have any questions regarding your seniority rights, please contact Carole Riley at (309) 345-6158.

Please submit the enclosed form if you plan to exercise your seniority.



Ms. Diane L Suchy
Page 2

If you choose not to select either of the above options on or before December 31, 1995, your employment will terminate effective December 31, 1995. You will have been provided the opportunity to utilize outplacement assistance, and this assistance will continue through March 15, 1996. In addition, you will have had at least 45 days during which your salary and benefits continued. After December 31, 1995, you will be eligible to purchase continued medical insurance coverage (COBRA) for 18 months. You will be paid for earned but unused 1995 and 1996 vacation.

Please send written confirmation of your choice of the listed alternatives, postmarked no later than December 31, 1995, to James L. Noel, Vice President Staffing and Development, by using the enclosed envelope.

Enclosed is a summary plan description for the BN Separation Pay Plan, a personalized statement containing estimates of your pension benefits (if applicable), a Release, and a Benefit summary. A copy of the Older Workers Benefit Protection Act Notice and Report will be sent to you. If you do not receive the report by November 16, 1995, please contact Dana Blackaby at (817) 333-3067. Please do not sign the Release until you have considered the Notice and Report.

If you wish to contest the Company's termination decision, you may pursue the BN Fair Treatment Program and you must utilize the Arbitration Policy.

We realize this is a very difficult time for you and your family and regret that this necessary action has to be taken. You are encouraged to carefully consider the options available to you and make use of the resources provided for you during this period.

Please call any of the individuals shown in the enclosed summary plan description. They will be glad to answer your questions and further clarify any of your options.

Sincerely,


James L. Noel

Enclosure

JLN:smc

11/01/95

Date

BNSF



LAWRENCE M. STROIK
Senior General Attorney

Burlington Northern Santa Fe

3017 Lou Menk Drive
Fort Worth, Texas 76131-2830

(817) 352-2357
(817) 352-2398 - Fax
Lawrence.Stroik@BNSF.com

RECEIVED APR 29 1999

April 27, 1999

Mr. Walter Hodynski
Heywood & Cari, S.C.
204 Locust Street
P. O. Box 125
Hudson, Wisconsin 54016

**Re: New York Dock Claims of Patricia Mike, Joel S. Peterson, Margaret
A. Ellingson, Eugene D. L'Allier, Diane L. Suchy, and David C. Mechavich**

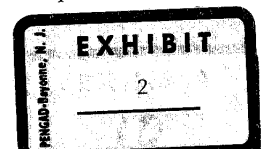
Dear Mr. Hodynski:

This is intended to attempt to set forth what is in our view the status of the above claims, taking into account your letters dated February 1 and February 9, 1999 as well as other correspondence between us.

As we see the situation, there are two major threshold issues involving all but one of the claims. In logical order, those issues are, first, whether the claims are barred by the applicable statute of limitations and/or the doctrine of laches, and second, whether the claimants occupied positions covered by the New York Dock conditions. In our view, all of the claims, except possibly that of Patricia Mike, are barred or disqualified by the answers to both of these issues.

First, the Interstate Commerce Commission Termination Act provides the applicable statute of limitations for, among other types of claims, those asserting claims for labor protection benefits. The statute provides that persons asserting such claims must file them within two years after the claim accrues. See 49 U.S.C. §§ 11704(b) and 11705(c). This two-year statute of limitations applies to claims under ICC labor protective conditions. See Modin v. New York Central Co., 650 F.2d 829 (6th Cir.), cert. denied, 454 U.S. 967 (1981). The Modin case involved a claim asserted on behalf of an exempt employee for benefits imposed pursuant to ICC merger protection conditions. The court held that the claim asserted three months after the two-year statute had run was time-barred. 650 F.2d at 833-834.

Our review of the claims you assert indicates that all of them, except Patricia Mike's claim, were asserted well outside the two-year limitations period. We do not believe it is open to



Mr. Walter Hodynski
April 27, 1999
Page 2

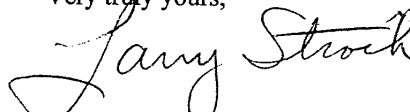
serious question that the claims of all of the claimants accrued, at the latest, when they were advised of the termination of their exempt positions.

Since it also relates to the timeliness of these claims, I have included the laches question within the first issue. In our view, all of the claims except perhaps that of Patricia Mike are also barred by the doctrine of laches. Since you are an attorney, I do not believe it necessary to dwell on this issue at length at this point. Instead, I include two arbitral awards that reject claims due to laches that were filed three years or less after the claimants had reason to believe they might have a labor protection claim. See the enclosed awards in Southern Railway v. IBB (Muessig, Ref. – February 13, 1990), and TCU v. Norfolk & Western (LaRocco, Ref. – June 20, 1990). I have not done an exhaustive search at this point, but I am sure that there are additional awards that support the application of laches to claims filed over two years after they accrue.

The second major threshold issue continues to be, of course, the issue of coverage under New York Dock. It is apparent from your letters of February 1 and February 9, 1999 that we have major factual differences regarding this issue. Rather than engage you "tit for tat" on each factual assertion that would be compared in testimony, I enclose three extensive awards less than a year old rendered on Union Pacific property. In the enclosed three awards, Referee Lamont Stallworth rejected New York Dock coverage for three exempt managers with Union Pacific. As you may be aware, Mr. Stallworth is a highly qualified and well regarded arbitrator. On the basis of these awards, at the very least, claims for New York Dock benefits on behalf of railroad employees at or above the exempt manager level are highly suspect and probably disqualified per se. I enclose copies of the awards for your review. In our view, again with the possible exception of Patricia Mike, all of the claims are also barred by the threshold coverage issue.

Allow me to suggest the following at this juncture. After you have reviewed the materials included with this letter, it might be beneficial for the two of us to talk live on the telephone, at least about Ms. Mike's claim. If you are still determined to pursue any of the other claims, we can also discuss how we might best go about getting these threshold issues resolved.

Very truly yours,



Lawrence M. Stroik
Senior General Attorney

LMS/pt
Enclosures

JOHN D. HEYWOOD
Of Counsel
SAMUEL R. CARI*
Court Commissioner
WALTER HODYNSKY*
SHEILA J.B. PAUL*

*Also Admitted to Practice
in Minnesota

HEYWOOD and
ATTORNEYS AT LAW CARI S.C.

MICHELLE M. SIMBRO
Paralegal
HEATHER M. SUMTER
Legal Assistant
THERESA M. BRORSON
Legal Assistant
CAROL McDANIEL
Office Manager

May 1999

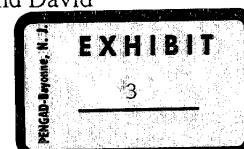
Lawrence Stroik
for General Attorney
Ft. Worth Northern Sante Fe Railway
117 Lou Menk Drive
Fort Worth, TX 76131-2830

Re: New York Dock Claims of Patricia Mike, Joel S. Peterson, Margaret A. Ellingson,
Eugene D. L'Allier, Diane L. Suchy and David C. Mechavich

Dear Mr. Stroik:

This refers to your letter of April 27, 1999 in response to my previous letter of February 9, 1999 as well as other correspondence concerning the New York Dock Claims of the above listed claimants. Although this letter is not intended to address at length the issues presented in your letter of April 27, preliminary comment on some of them are in order. After I have had the opportunity to more thoroughly review the arbitration awards and case law as well as statutes which you have cited, I will be back in contact with you.

To begin with, it should be pointed out that you raise the issues of a purported statute of limitations violation and the doctrine of laches for the first time concerning these claims, nearly one year following your initial correspondence on the matter. In respect to the former, you did not provide me with a copy of the case which I will need to review together with your statutory citations. However, this is to my knowledge, the first time the carrier has raised the statute of limitations argument in these type of claims. Nor am I aware of this being previously done in the context of any arbitration awards and you have cited none in support of your position. In any event, you argue that all the claims "except Patricia Mike's claim, were asserted well outside the two-year limitations period." Obviously, I will have to review the case law as well as the statutory language to see if there is any basis for your argument. However, I must take strong exception to your statement that "we do not believe it is open to serious question that the claims of all the claimants accrued, at the latest, when they were advised of the termination of the exempt positions." I seriously doubt you actually intend what you have written since the effect of that statement is fairly far ranging and not very favorable to the carrier. After all, if the claims of the claimants accrued when they first received notice of their future job abolishment, and the job abolishment did not occur, are you then stating that they still have a claim? Until now, I believe the carrier has uniformly taken the position that there would be no adverse affect until the position is actually abolished. With respect to claimants Suchy, Ellingson, Peterson and L'Allier, that was January 1, 1996 and with respect to Patricia Mike, it was August 14, 1996 and David



Mechavich, April 8, 1996. Concerning claimant Suchy, and possibly other claimants as well, a review of her file reveals that she did in fact originally present a claim on her own behalf on November 21, 1995. Her claim was denied by Director of Labor Relations, Wendel Bell on December 14. A copy of this correspondence is enclosed for your reference.

With respect to your second argument, concerning laches, I strongly disagree that it would have any application in this case. Although you have cited two (2) arbitration awards in support of your position, maintaining that claims brought less than three (3) years after they accrued were denied for this reason, copies of those awards were not submitted with your letter. Therefore, so that I may review this matter further, I would appreciate your submitting copies of the Southern Railway v. IBB (Muessig) and TCU v. Norfolk & Western (LaRocco) awards. In any event, for the doctrine of laches to apply, I believe you would have to satisfy the definition of this doctrine as it is stated in Black's Law Dictionary, Third Edition:

"Omission to assert a right for an unreasonable and unexplained length of time under circumstances prejudicial to adverse party."

There claims were not asserted for an unreasonable length of time. After all, we are not talking of claims filed 5, 10 or more years after the alleged date of occurrence. Secondly, the filing of these claims cannot be considered as prejudicial to the carrier in as much as the carrier was fully aware, and in fact, must have contemplated that there would be New York Dock Claims filed by management personnel following the abolishment of their positions on or after January 1, 1996. Indeed, I have previously filed three (3) similar claims on behalf of claimants Fuller, Pechman and Ollek which have been allowed. To date, however, the issues of general wage increases and fringe benefits which I have raised in connection with those claims, have not been addressed by you. I assume that this is something we will discuss in the very near future.

Finally, with respect to the merits of the claims, you maintain that the claimants, except for possibly Patricia Mike, are not covered by the New York Dock Employee Protective Conditions. I strongly disagree notwithstanding the Union Pacific arbitration awards which you have submitted to me in support of your position. I would be more interested in reviewing those recent awards on the Burlington Northern Property which are adverse to your position. One such award I am aware of involves claimant James V. Nekich, which was issued on December 6, 1996 by arbitrator Christine VerPloeg. It is my further understanding that only recently the matter was submitted back to Arbitrator VerPloeg for further consideration of specific fringe benefits to which Mr. Nekich would be entitled in accordance with the terms of the award. If you would provide me with a copy of her interpretation of that award concerning fringe benefits, as well as copies of all other pertinent awards on the Burlington Northern property, I think it would be more helpful in facilitating an agreeable resolution of these claims.

After you have provided me with the additional awards which I have requested above and I have had the opportunity to review those awards, cases and statutory citations in your letter, I will call you so that we may more thoroughly discuss these claims and whether the carrier will be allowing the same or if it will be necessary to submit them to arbitration in the very near future. I would also appreciate your replying to my letter as soon as possible.

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

Walter Hodynsky

Encl.

cc: Patricia Mike
Joel Peterson
Margaret Ellingson
Eugene L'Allier
Diane Suchy
David Mechavich
Sharon Olek
Robert Pechman
Wayne Fuller

BNSF



LAWRENCE M. STROIK

Senior General Attorney

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3017 Lou Menk Drive
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Lawrence.Stroik@BNSF.com

May 25, 1999

Mr. Walter Hodynski
Heywood & Cari
204 Locust Street
P. O. Box 125
Hudson, Wisconsin 54016

**Re: New York Dock Claims of Patricia Mike, Joel S. Peterson,
Margaret A. Ellingson, Eugene D. L'Allier, Diane L. Suchy,
and David C. Mechavich**

Dear Mr. Hodynski:

This is in response to your letter dated May 3, 1999 regarding the above claims for New York Dock benefits.

As requested, I enclose copies of the Muessig and LaRocco awards concerning the laches point, referred to in my letter to you of April 27, 1999. I apologize for omitting copies of those awards, which I intended to include.

With respect to your point about the date that a New York Dock claim accrues, I am not sure I understand your point. Of course, if there is no eventual job abolishment, then a claim for benefits due to the job abolishment cannot arise. However, if a job abolishment does follow according to the notice provided to the employee, I see nothing that would prevent the accrual date for any claim arising out of the job abolishment from being the date that the employee was notified. Certainly this is more consistent with general claim accrual rules, which are keyed to the date of first notice.

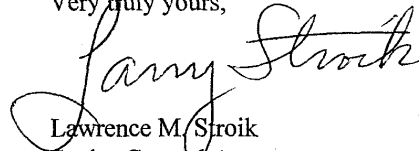
With respect to claimant Diane L. Suchy, thank you for the copy of Mr. Bell's letter dated December 14, 1995 denying her earlier claim for New York Dock benefits. My letter, however, was responding to the claim on her behalf that you first submitted dated June 29, 1998. It appears that we will have to consider there to be an issue concerning her two claim filings, in connection with the statute of limitations, laches, and coverage issues.



Mr. Walter Hodynski
May 25, 1999
Page 2

Finally, I have not included a copy of the Nekich award of arbitrator Ver Ploeg, because in that case the arbitrator specifically found the employee to occupy a position (Quality Coordinator) below that of a manager. You may, of course, provide me with any awards which you believe support your apparent position of employee coverage.

Very truly yours,



Lawrence M. Siroik
Senior General Attorney

LMS/pt
Enclosures

Mark

IN THE MATTER OF ARBITRATION :
before an :
ARBITRATION COMMITTEE :
under :
ICC FINANCE DOCKET NO. 28250 :
(NEW YORK DOCK CONDITIONS) :
APPENDIX III, SECTION 11 :
:

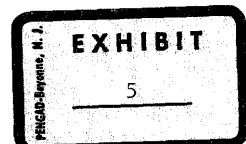
HEARING HELD IN ST. PAUL, MINNESOTA, JUNE 26, 1984

PARTIES BROTHERHOOD RAILWAY CARMEN OF THE
TO UNITED STATES AND CANADA
and
DISPUTE: BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT FILE NO. SCA 83-5-10-B:

OF 1. That the Burlington Northern Railroad
CLAIM: Company, hereinafter referred to as BN or Carrier,
violated and breached the letter and intent of the
provisions of ICC Finance Docket No. 28250 (commonly
known as New York Dock Conditions), when the afore-
said Carrier furloughed the employee listed below
at St. Louis, Missouri, as a result of a trans-
action within the meaning of the New York Dock
Conditions but failed and refused to provide said
employee with the protective benefits provided for
in New York Dock. The following employee, herein-
after referred to as Claimant, was improperly denied
protective benefits: Kevin Byers.

2. That Carman Apprentice Kevin Byers, be
compensated accordingly beginning with the month
of February, 1982 and continuing through his period
of protection as provided.



F I N D I N G S

The Carrier and the Organization are parties to an implementing Agreement dated January 29, 1981 relating to application of New York Dock Conditions to certain Carmen at Kansas City and St. Louis. Pertinent excerpts of these documents are included in the Arbitration Committee's Award in File No. SCA 82-11-3, which are included here by reference.

Claimant was employed as a Carman Apprentice at St. Louis on March 26, 1979. He was placed on leave of absence owing to an off-duty injury on June 20, 1981. The Carrier states that if he had not been on leave of absence, he would have been furloughed on August 10, 1981. Having been released to work following his injury, the Claimant reported for work in February 1982 and was told that he did not have sufficient seniority and so remained on furlough.

The Claimant at this point was not offered merger protection pay, nor did he apply for same at this time. In December 1982, he did apply for such protection pay, which was denied by the Carrier, giving rise to this claim.

The Organization points out, without contradiction, that similarly situated Carmen Apprentices with greater and less seniority did receive merger protection pay.

The Carrier raises a threshold issue, arguing that the claim for benefits is untimely, since it was not filed within 60 days as required by Rule 34 (a), which reads in pertinent part as follows:

All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . .

The Organization argues that Rule 34 (a) is not applicable to disputes arising under New York Dock Conditions. The Arbitration Committee agrees with the Organization's view on this point. Section 11 of the New York Dock Conditions reads in pertinent part as follows:

11. Arbitration of disputes - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. . . .

Specific time limits are provided for Sections 4 and 12, neither of which is at issue here. Section 11 provides no time limits for disputes under other sections. Since the parties have accepted the New York Dock Conditions in reference to merger protection matters, it follows that Section 11 is also the only guide for resolution by arbitration of such matters. The Local Chairman's letter of March 19, 1983, claiming benefits for the affected employee, makes specific reference to coverage by New York Dock Conditions.

The Carrier argues that the Claimant was not "adversely affected by a transaction" since he was not an active employee

in August 1981, when his position was abolished (and when other similarly situated employees were found to be protected). Although the Claimant was not available for work in August 1981 owing to his leave of absence status, the Arbitration Committee finds no question that he was adversely affected. The position which he held, and in which he would be working other than for his injury, was abolished. The Carrier paid protection benefits to others in the same position and with the same seniority. The Claimant could hardly have requested pay for the period of time he would not have provided service owing to his injury. His loss, however, is directly related to the transaction and became a reality upon his recovery in February 1982.

The Carrier suggests that, in giving benefits to the Claimant, this would be substituting benefits for one employee which had already been granted to another employee. This is conjecture. Whether the number of furloughs would have been affected if, in fact, the Claimant was on active status in August 1981 is not proven.

Claimant held a position affected by a transaction, even though for a period he would have been incapacitated in its performance. To deny him benefits effective from the date of his recovery would be contrary to the provisions of the applicable New York Dock Conditions.

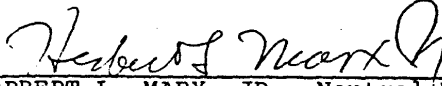
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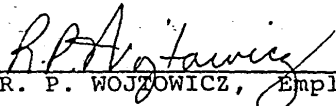
The claim is sustained. The Claimant shall be offered merger protection benefits to the extent that he would have

been provided same except for his leave of absence status,
but to be effective beginning in February 1982.

New York, New York

Dated: August 30, 1984


HERBERT L. MARX, JR., Neutral Member
and Chairman


R. P. WOJZOWICZ, Employee Member


CLEMENT LANE, Carrier Member

September 18, 1996

Mr. Walter Hodynsky Esq.
Heywood & Cari S.C.
204 Locust St.
P. O. Box 229
Hudson, WI 54016

charity in your will.

Dear Mr. Hodynsky:

This is in reply to your letter of July 9 appealing the claim of Sharon Olek for benefits under the New York Dock Conditions.

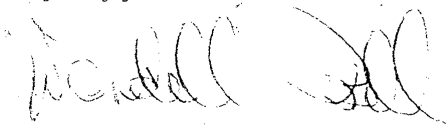
As you are very well aware, there are no time limits in those Conditions, and so certainly no "payable as presented" remedy for an alleged breach of such non-existent time limits. I find it more than a little surprising that you would even bother to raise such a worthless point.

On the other hand, perhaps you had to resort to such tactics, in view of the fact that the underlying claim has so little merit. Ms. Sharon Olek was a Technical Analyst in the Network Operations Center in St. Paul. Certainly, this was not some high-level, influential position, with sweeping supervisory and policy responsibilities. But nor was it a position that was devoid of knowledge, expertise and responsibility. It was, overall, as the title properly suggests, a technical job.

That is, however, a significant point, for Article IV of the New York Dock Conditions does not cover all exempt positions. Rather, as many Awards have recognized, it *only* covers positions which are subject to unionization. Even in the railroad industry, a position with the duties and responsibilities of the Technical Analyst, as set forth in the attached Position Description, are not, and never have been unionized, or subject to unionization.

For that reason, the claim you are presenting fails, and is respectfully declined in its entirety.

Very truly yours,



1

olek1



Burlington Northern Santa Fe Corporation

Records Retention Schedule

Human Resources

Category Record Category Title Record Category Description

HUM1000 Human Resources

Benefits
Benefit Plans

Records related to Company sponsored benefit plans (e.g., medical, life insurance, disability, survivor programs, ESOP, PAYSOP, pension, vesting criteria, thrift and profit sharing plans, separation pay plans, stock option plans, vacation entitlements, educational assistance, employee relocation programs). Includes SEC registration statements and correspondence explaining the benefit plans.

Retention Requirement: Life of Plan + 6 Years

HUM1010 Human Resources

Benefits
Contributions / Participation

Records related to contributions and participation in Company-sponsored benefits plans. Includes records of notifications of eligibility to participate in the plans and elections by employees for the type and amount of participation in the plans. Benefit plans may include insurance, disability, pension, savings, etc.

Retention Requirement: 6 Years

HUM1020 Human Resources

Benefits
Employee Records - Vested

Vested employee benefit records related to cumulative years of service, total pension contributions, accrued benefits, etc.

Retention Requirement: Permanent

HUM1021 Human Resources

Benefits
Employee Records - Non-Vested

Non-vested employee benefit records related to cumulative years of service, total pension contributions, accrued benefits, etc.

Retention Requirement: Until Termination + 6 Years

HUM2000 Human Resources

EEO Administration Records related to the Company's affirmative action program, including federal and state EEO reports (e.g., AAP, EEO-1, VETS-100, Canadian Equity Report, and all state EEO reports), internal audit information, and federal/state compliance reviews.

Retention Requirement: 3 Years

HUM3000 Human Resources

Employee Selection

Records of a general nature related to personnel requests, including job applications, resumes, pre-employment testing, advertising, postings, interviews, etc. (See MED3030 for positive pre-employment drug test results; UNR0000 for unsolicited resumes)

Retention Requirement: 3 Years



Burlington Northern Santa Fe Corporation

Records Retention Schedule

Human Resources

Record

Category Record Category Title Record Category Description

Form 25049 Must be Submitted and Approved Prior to the Destruction of Official Company Records 12

HUM3010 Human Resources

Employee Selection

Immigration

Includes forms (I-9) required to comply with the Immigration Reform and Control Act.

Retention Requirement: Until Termination + 3 Years

HUM4000 Human Resources

Personnel Records

Records that document the work history of individual employees, including the employee's application for employment and resume; records documenting changes in job title, status, position, location, and wages or salary; training, educational, or developmental records, including attendance records and internal resumes; certifications / acknowledgements verifying receipt of Company policies and procedures; performance records, including appraisal forms and corrective action plans; and notices of commendation, warning, discipline, or termination. Also includes separation packages.

Retention Requirement: Review 6 Years after Termination

HUM5000 Human Resources

Training / Development

General

Records related to the development and operation of Company sponsored training programs and seminars, including areas such as leadership/management development, computer software training, technical training, illness/injury prevention, etc. Includes education assistance, course listings, schedules, requests and approvals, etc.

(See ENV1000 for environmental training records; HUM4000 for summary training records related to individual employees)

Retention Requirement: 6 Years

HUM5010 Human Resources

Training / Development

Locomotive Engineer Certifications

Records related to the issuance, denial, or revocation of locomotive engineer certificates. Includes information supporting the Company's determination, such as data relating to eligibility for certification; information regarding vision and hearing acuity, and records concerning demonstration of operational knowledge and performance skills, including those relating to the training, testing, monitoring, and continuing education of locomotive engineers.

Retention Requirement: Date of Certification + 6 Years

HUM6000 Human Resources

Salary Administration Records related to determining and monitoring salary and deduction amounts, including salary structure information and market analyses.

Retention Requirement: 6 Years

Burlington Northern Santa Fe Corporation

Records Retention Schedule

Human Resources

Record

Category Record Category Title Record Category Description

Form 25049 Must be Submitted and Approved Prior to the Destruction of Official Company Records 13

HUM6010 Human Resources

Salary Administration

Job Descriptions

Records related to job descriptions, including job review and position evaluation material such as SPQ's (Salary Position Questionnaires) and NSP's (National Salary Positions).

Retention Requirement: As Long as Position Exists + 10 Years

<comment> PLB0382A14 (UTU & D&H)
<awddate> 7/30/1974 </awddate>

Leslie
T/commer

PUBLIC LAW BOARD NO. 382

UNITED TRANSPORTATION UNION (E)
v.
DELAWARE AND HUDSON RAILWAY CO.

AWARD NO. 14
CASE NO. 12.64

STATEMENT OF CLAIM:

Claim for one day's pay at hostler's rate for the following firemen at Fort Edward on dates listed as follows: Fireman W. Winters on December 15, 1963, required to start engine 4111 and remove from roundhouse, after completing his tour of duty in yard service. This unit was not assigned to him. December 22, 1963 required to start engine 4092 and remove from roundhouse, after completing tour of duty on yard service. This unit was not assigned to him. January 5, 1964 required to start engine 4088 and remove from roundhouse, after completing tour of duty in yard service. This unit was not assigned to him.

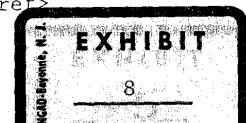
Fireman R. Adams same duties on February 11, 12 and 13, 1964.
Fireman T. Turner same duties on December 10 and 11, 1963.
Fireman L. Tracey same duties on December 7, 1963.
Fireman M. Dannehy same duties on February 8 and 9, 1964.
Fireman C. Barlow same duties on December 17, 19, 20, 21 and 28, 1963; January 3, 7, 8 and 10, 1964.

FINDINGS:

These claims are based on the premise that the Claimants herein were required, after completing their tours of duty as yardmen, to perform hostler work. The Organization contends that Carrier violated the agreement by requiring the Claimants at the conclusion of their yardwork at Fort Edward to take locomotives in and out of the roundhouse. In one instance, one of the Claimants was required to do such work with a locomotive that was not assigned to him.

Carrier asserts that the Claimants, other than Claimant Winters (who worked with a locomotive not assigned to him), "nearly placed their locomotives on the tie-up track inside the roundhouse before they registered off duty." Carrier further asserts that: 1) Under the provisions of Article 7 and Article 9, firemen in yard service shall have a designated point for going on and off duty (Article 7) , and that firemen shall be paid from the time they are required to report for duty and end when the locomotive is delivered at the point designated; and 2) Claimants, in operating their locomotives from the dispatch track in the roundhouse at the beginning of their tour of duty and operating their locomotives to the tie-up track in the roundhouse at the close of their tour, were not performing "additional service" but merely fulfilling the duties of their assignment.

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-2-

AWARD NO. 14
CASE NO. 12.64

An examination of the record reveals that there is no indication that Carrier has designated the point for going off duty. Moreover, there is nothing in the record that indicates, by bulletin or otherwise, that at Fort Edward the engine crew are required to go into the enginehouse to commence their work, i.e. go inside the enginehouse to get their locomotives.

As a consequence, Article 7 is not applicable, and, under the particular circumstances of this dispute, the claims must be sustained.

Finally, with respect to Carrier's defense of "laches", the Board finds that it is without merit. The doctrine of "laches" had its genesis in the courts of equity and evolved as one of the many remedies created by the equity chancellors as a means of rectifying the "action at law" deficiencies. It was and is a unique and seldom applied concept utilized only in extraordinary circumstances. This record does not warrant the application of the doctrine of "laches".

AWARD

Claim sustained. Carrier is directed to comply within 30 days from the date of this award.

N. H. Zumas, Neutral Member

G. H. Bunde, Employees Member

C. J. Becker, Carrier Member

Albany, New York
July 30, 1974

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In the Matter of Arbitration Between:)

Transportation-Communications
International Union -- BRAC

and

Union Pacific Railroad Company.

Pursuant to Article I, Section 11
of the New York Dock Conditions
Imposed by the Interstate Commerce
Commission in Finance Docket No.
30,000

Case No. 4

Before Arbitration Committee
Members:

Richard D. Meredith
General Director -- Labor Relations

Carrier Member

William R. Miller

Employee Organization
Member

Lamont E. Stallworth
Labor Arbitrator

Neutral Member

Hearing Held:

Chicago, Illinois
August 18, 1988

ISSUE IN DISPUTE:

The Parties have submitted the following issue to the Committee:

1. Did the following employees fail to timely file for New York Dock benefits?

Cases: L. A. Avery
M. A. Rogers-Dopheide
R. T. Ford
J. O. Kjosa
G. D. Points
M. F. Mull



BACKGROUND:

This case addresses whether certain employees filed for New York Dock benefits so late that they are no longer entitled to those benefits. In September, 1982 the Interstate Commerce Commission (I.C.C.) approved the merger and consolidation of the Missouri Pacific Railroad Company (MP), the Western Pacific Railroad Company (WP) and the Union Pacific Railroad Company (UP). As a condition of that merger the I.C.C. imposed a set of labor protective conditions upon the railroads involved to afford some protection to the employees affected by the merger. This protection, known as the New York Dock Conditions, offers certain benefits and guarantees to employees who are affected by merger-related transactions.

On May 1, 1986, the Carrier announced a company-wide force reduction. On this date the Carrier offered employees certain benefits under a voluntary force reduction program. In the same announcement the Carrier also described the terms of an involuntary force reduction program, which it said it would put into effect if it did not obtain enough volunteers for the voluntary program.

In June, 1987, in another case before an Arbitration Committee between the same Parties, the Committee decided that the force reduction was related to the merger, at least as it affected the claimant, P. J. Kelly, who worked in the Accounting Department. Therefore the committee determined that the claimant was eligible for benefits under the New York Dock Conditions,

which are more generous than the benefits and protection offered by the Carrier under its force reduction programs.

Most if not all of the Claimants in the instant case were affected by force reductions which occurred prior to the force reduction which affected Mr. Kelley. Most of them applied for benefits shortly after the Kelley decision was rendered; two applied for benefits approximately five months before that decision was rendered. (See chart, p. 11 of Carrier's Submission).

The Carrier denied the claims on several grounds, e.g. that even though Mr. Kelley may have been affected by a merger-related transaction, they were not. In each of the cases before us, the Carrier also denied the claims on the basis that the Claimants had not filed in a timely fashion.

For purposes of this case the Parties have narrowed the issue to the timeliness of the claims. Therefore the only question before this Committee is "whether the doctrine of laches dictates that the Claimants have waived their rights to the protective benefits of the New York Dock Conditions".

EMPLOYEE'S ORGANIZATION'S POSITION:

The Employee Organization contends that the claims involved in this dispute should not be denied on the basis that they were not filed in a timely fashion. The Employee Organization argues first that there is no dispute that the New York Dock Conditions contain no time limit for filing claims. According to the

Organization, this issue is so well-settled that the issue has become a foregone conclusion, an accepted fact.

The Organization also asserts that the doctrine of laches does not apply to this case. The Organization suggests that standard time limit provisions do not apply to disputes arising under employee protective agreements, which are particularly attuned to the rights of employees.

Even if the doctrine of laches does apply to these claims, the Organization insists that it does not apply in this case to bar the claims. According to the Organization, the doctrine of laches encompasses more than the mere passage of time. In the spirit of equity which governs the application of laches, the Organization contends that it does not apply because there has been no lack of due diligence on the part of the Claimants, and because the Carrier has not been harmed by the delays.

According to the Organization, the Carrier agreed to hold the time limits on similar claims in abeyance until the Kelley decision was rendered. According to the Organization, it has been clearly established in this record, as well as other records before this Committee, that the Carrier told all of the Claimants initially that they were not entitled to the protective provisions of New York Dock. The Claimants accepted the Carrier's contention until the Kelley decision was issued. The Organization argues that because the Carrier led the Claimants astray in terms of defining their rights, the Carrier is estopped from interposing laches as a bar to the claim.

The Organization also urges the Committee to consider the Claimants' situation in relation to the pendency and findings of the Kelley case. According to the Organization, the Carrier's agreement to hold the disputes of similarly-situated employees in abeyance pending the outcome of the Kelley case delayed the filing of the written claims.

In addition, the Organization contends that the Carrier has not been prejudiced by the delay. The claims represent no surprise for the Carrier; according to the Organization they represent the culmination of an ongoing dispute and most of the delay is the Carrier's own fault for refusing to pay benefits earlier. The Claimants, not the Carrier have suffered more from the delay, the Organization contends.

For all of the above reasons the Organization argues that the claims should not be denied on the grounds of laches.

THE CARRIER'S POSITION

The Carrier contends that these claims should be denied on the basis of laches for a number of reasons. As a preliminary matter the Carrier contends that although there are no precise time limits set forth in the New York Dock Conditions, there is inherent in the agreement an obligation to file a claim in a timely manner. The Carrier cites several arbitration opinions to support this proposition, including one which states that even in the absence of contractual or statutory time limits, the failure of a party to process a claim within a reasonable time must be construed as an abandonment of the claim.

The Carrier also contends that all of the following requirements for imposing laches to bar a claim have been satisfied in this case. First, the Carrier acted in such a way to trigger an obligation on the part of Claimants to act or exercise their rights. Second, the Claimants delayed in filing their claims, long after they were clearly aware of the Carrier's action. Third, the Carrier had no notice that the Claimants would assert their rights until they filed their claims. Fourth, the Carrier asserts that it was prejudiced by the Claimants' failure to assert their rights. In particular the Carrier claims that the Claimants' delays made it impossible to mitigate the Carrier's liability for protective benefits, as the New York Dock Conditions require.

At the arbitration hearing the Carrier specifically pointed out the difficulty of recreating seniority rosters now for employees affected several years ago. These rosters would need to be recreated in order to determine the highest position each employee should have been offered in order to mitigate the damages of the Carrier in offering protective benefits.

The Carrier also contends that a "reasonable" period of time for filing a claim in the instant case should be relatively short, because the Claimants had immediate and definitive knowledge of their displacements as soon as they occurred. According to the Carrier, any delay beyond the date of the alleged displacement represents pure procrastination on the part of the Claimants.

Therefore the Carrier argues that an appropriate "reasonable" time frame within which to file claims for displacement allowances is ninety (90) days. Therefore the Carrier urges that all of the instant claims in this case should be denied.

OPINION

The Parties submitted the following issue to the Arbitrator:

1. Did the following employees fail to timely file for New York Dock benefits?

Cases: L. A. Avery
M. A. Rogers-Dopheide
R. T. Ford
J. O. Kjosa
G. D. Points
M. F. Mull

After considering the evidence and arguments presented by the Parties the Arbitrator concludes that the Claimants did not fail to timely file for their New York Dock benefits. The Arbitrator's conclusions, findings and reasoning follow.

The Carrier concedes, as it must, that there is no precise period for filing claims which is stated in the New York Dock Conditions. However, the Carrier, after examining other parts of the Conditions, contends that a period of ninety (90) days after the initial displacement is a sufficient period in which to file. Claims filed after that period should be barred by laches, according to the Carrier.

This Committee concurs that laches may apply to claims filed under the New York Dock Conditions or other labor protective agreements in the railroad industry, as another Committee wrote

in Gerald Thomas and Brotherhood of Locomotive Engineers and Union Pacific Railroad Company, (Stallworth Neutral Member 1988). The Carrier in this case has asked the Committee to establish a precise filing period after which laches takes effect. To establish one period for an entire group of cases would violate the spirit of laches. The Committee point out that laches is an equitable doctrine which depends to a large extent upon the circumstances of a particular case. Furthermore, there is no need for the Committee to establish a standard filing period, because the agreed-upon issue asks only whether these individual claimants filed in a timely manner. Therefore the Committee declines to set a precise filing period.

In deciding the individual cases at issue here, the Committee notes first of all that the employees were grouped together for the purposes of this claim actually hold somewhat distinct positions. All but one of the employees was involved in a transaction that occurred before the transaction which formed the basis of the Kelley claim. It is a bit difficult to see how these employees could have been waiting for the resolution of the Kelley claim, when their own situations arose as much as three years before the circumstances giving rise to the Kelley claim.

Nevertheless, the Organization has argued that the transactions were similar, that the same type of non-agreement employees were involved, and most important, that the Parties had an ongoing dispute about whether non-agreement employees were entitled to New York Dock benefits. The Carrier has not refuted

this assertion. Therefore the Carrier cannot reasonably argue that the claimants should have known about their claims as soon as they were displaced, or with the first paycheck thereafter.

Furthermore, in a sense the Carrier's failure to grant benefits to the non-agreement employees can be viewed as a continuing violation. Under the applicable New York Dock agreement an affected employee generally is entitled to six years' protection, including six years' monetary benefits if dismissed or displaced to a job which pays less than the claimant's original job. For every monthly payment missed, the claimants were injured. Where there is a continuing violation it is not uncommon to hold that a reasonable filing period does not begin only with the first missed payment.

Finally, the Committee notes that the Carrier has not pointed to a single case in which laches has been applied to block New York Dock claims, except perhaps where the Parties had a well-established past practice establishing a certain time limit. Furthermore, given the particular circumstances of this case, the Committee holds that the application of laches is not appropriate.

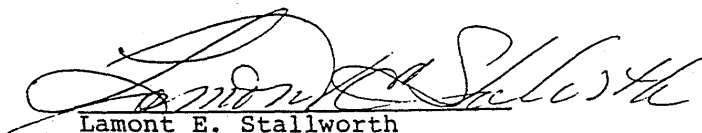
Notwithstanding this ruling, the Committee concludes that it would greatly serve to ensure and preserve the rights of employees if they were to file their claims in a more timely fashion, notwithstanding the filing of a Kelley type test claim. After all, in order for the mechanism of the grievance and arbitration process to operate, a claim must be filed. Several

of the claims here arose long before Kelley. Perhaps any of them could have served as a Kelley-type test claim, and resolved these issues at an earlier date.

Nevertheless, based upon the circumstances of this case, the claims will not be denied on the basis of laches.

AWARD

The claims will not be denied on the basis of laches.


Lamont E. Stallworth
Neutral Member

Richard D. Meredith
Carrier Member

William R. Miller
Employee Organization Member

Signed this 26th day of November, 1988.

City of Chicago
County of Cook
State of Illinois