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BY HAND

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

ENTERED
Office of Proceedings

JUN 24 2002

Part of
Public Record

Re: Finance Docket No. 32549, *Sub 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 Carrier's Motion for Leave to File a Reply to Claimant's Reply, and attachment thereto, 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 motion and attachment in WordPerfect 8.0.

An additional copy of the motion 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

Enclosures
cc: Walter Hodynsky

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32549

Sub 24



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

**CARRIER'S MOTION FOR LEAVE TO FILE A REPLY
TO CLAIMANT'S REPLY**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby moves this Board for leave to file a reply to Claimant's Reply to Carrier's Petition for Review of Arbitration Award. Claimant's Reply was filed on June 4, 2002. In light of the importance of the issues raised in Carrier's Petition for Review of Arbitration Award, and the numerous misstatements of law and fact in Claimant's Reply, BNSF hereby respectfully requests that the Board grant its motion for leave to file a reply to Claimant's Reply. BNSF's reply is attached to this motion.

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Charles W. Shewmake
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
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Respectfully Submitted,

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

Dated: June 24, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2002, a true copy of the foregoing Carrier's Motion for Leave to File a Reply to Claimant's Reply, and attachment thereto, submitted by The Burlington Northern and Santa Fe Railway Company, was served by first class mail and facsimile, on the following:

Walter Hodynsky, Esq.
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", with a horizontal line extending from the end of the signature.

Lisa M. Harrison

Attachment

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32549

Sub 24 205696

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

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CARRIER'S REPLY TO CLAIMANT'S REPLY

The Burlington Northern and Santa Fe Railway Company's ("BNSF's") Petition for Review of Arbitration Award showed that the arbitration decision and award to Diane Suchy ("Claimant") on April 25, 2002, should be reviewed and set aside pursuant to 49 C.F.R. § 1115.8. In its Petition, BNSF demonstrated that the timeliness of a claim seeking *New York Dock* benefits in the absence of an implementing agreement specifying a time period for filing claims is an important and recurring issue that warrants review by this Board. BNSF asserted further that the Board should set aside the Award because Claimant's claim is barred by the applicable two-year statute of limitations, 49 U.S.C. § 11705(c), and also by laches.

Among other inaccuracies in Claimant's Reply, Claimant contends that (1) this Board does not have authority to review this issue under 49 C.F.R. § 1115.8; (2) the two-year statute of limitations for claims involving 49 U.S.C. § 11326 does not apply to claims seeking benefits under *New York Dock*, even though *New York Dock* protections are imposed pursuant to § 11326; and (3) despite Claimant's two year and seven month delay in pursuing her claim, her claim is not barred by laches. None of these points have any merit, as demonstrated below.

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

As BNSF demonstrated in its Petition (at 5-6) this Board should review and set aside the Suchy Award pursuant to 49 C.F.R. § 1115.8, and *Chicago & North Western Transportation Co.*, 3 I.C.C.2d 729, 736 (1987) ("*Lace Curtain*"). The timeliness of a claim seeking benefits under *New York Dock* in the absence of an implementing agreement that sets a time limit for filing such claims is a "recurring" issue of "general importance" that warrants review by this Board under the *Lace Curtain* standard. In addition to the BN-SF merger, there have been numerous other mergers affecting exempt employees' entitlement to *New York Dock* protections that do not have an implementing agreement specifying a deadline for filing such claims. Claimant's response in her Reply (at 7), essentially that there should be no standards for assessing the timeliness of claims in these situations, is an unfounded and impractical means of resolving this issue and, if anything, confirms the need for review by the Board. 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 an 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.

As BNSF showed in its Petition (at 6-9), the two-year statute of limitations set out in 49 U.S.C. § 11705(c) applies when *New York Dock* labor protective conditions have been imposed pursuant to 49 U.S.C. § 11326. See also *Modin v. New York Cent. Co.*, 650 F.2d 829, 834 (6th Cir. 1981) (stating 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 her Reply, Claimant's argument that this two-

year statute of limitations does not bar her claim fails entirely.

Claimant's assertion (at 9) that the statute of limitation applies only to claims brought under 49 U.S.C. § 10101 is spurious. As set out in BNSF's Petition (at 6-7), it is clear that the statute of limitations in § 11705(c) applies to any claim brought against a carrier alleging a violation of Part A of Title 49 of the U.S. Code. The imposition of *New York Dock* conditions in rail mergers is required by 49 U.S.C. § 11326, which is part of Part A of Title 49. Therefore, a claim for nonpayment of a displacement allowance required by the *New York Dock* conditions is a claim against a carrier for a violation of Part A, and is subject to the statute of limitations in § 11705(c).

Claimant's citation to *In re Arbitration under ICC Finance Docket No. 28250, Brotherhood Railway Carmen of the United States & Canada and Burlington Northern Railroad* (Marx 1984) (Claimant's Exh. 5), is inapposite. *Brotherhood Railway Carmen* does not address the two-year statute of limitations in § 11705. Instead, the decision states that Rule 34(a) of the collective bargaining agreement between the carrier and the employees, under which an employee's claim or grievance is "allowed as presented" if the Carrier does not notify the employee within 60 days of the reasons for the disallowance, "is not applicable to disputes arising under New York Dock Conditions." *Id.* at 3. The statement in the decision that "Section 11 is * * * the only guide for resolution by arbitration of such matters," *id.* at 3, refers to the fact that neither Rule 34(a), nor the limits in other sections of *New York Dock*, are applicable. But

this decision did not address, let alone preclude, applying the two-year statute of limitations in 49 U.S.C. § 11705(c).¹

It is undisputed that claimant did not file a sufficient complaint for benefits under *New York Dock* for over two and one-half years. As Claimant cannot offer any persuasive reason why the two-year statute of limitations should not apply to her claim, the Award should be set aside on statute of limitations grounds.

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

Claimant has failed to demonstrate why her claim should not also be barred under the doctrine of laches. As BNSF showed in its Petition (at 9-11), laches bars this claim because Claimant's delay in establishing her claim was not simply "disturbing," as the Arbitrator stated, but it hampered BNSF's ability to present "concrete evidence" to the Arbitrator. See Award at 12 (Attachment 5 to BNSF's Petition). Nonetheless, the Arbitrator did not apply laches to bar the claim because she found that BNSF had only suffered "speculative" prejudice. *Id.* By finding that the prejudice to BNSF was only "speculative," the award improperly shifts too high a burden on the carrier, and relieves the claimant of her duty to file a claim within a reasonable time.

As the timeliness of claims is an important issue warranting review under the *Lace Curtain* standard, the Board should review the laches issue and clarify the standards for the application of laches to claims seeking *New York Dock* protective benefits.

¹ For the same reason, Claimant's reference to the letter of Wendell Bell (Claimant's Exh. 6) is irrelevant. In that letter, Mr. Bell refers to the fact that the "payable as presented" provision requiring payment of certain claims arising under the collective bargaining agreement, referred to in decisions such as *Brotherhood Railway Carmen*, is not applicable to claims brought under *New York Dock*.

Claimant asserts erroneously in her Reply (at 11-15) that the doctrine of laches should not be applied to disputes concerning benefits under the *New York Dock* Conditions. In support of her contention that laches is not an available defense, Claimant relies on *In re Arbitration between TCU-BRAC and Union Pacific Railroad Company*, Finance Docket No. 30,000 (Stallworth 1988) (Claimant's Exh. 9). But, in that case, the arbitration committee did not hold that laches is not an available defense to a claim for benefits under *New York Dock*; rather it held that laches did not require filing of claims within 90 days because, unlike the Claimant here, the employees there could not have "known about their claims as soon as they were displaced." *Id.* at 9. In other words, as the committee stated expressly, it held that "given the particular circumstances of this case, the Committee holds that the application of laches is not appropriate." *Id.* (emphasis supplied). In this case by contrast, Claimant knew of her claim upon displacement yet nevertheless delayed -- without justification -- in presenting her claim for more than two and one-half years. Indeed, *Union Pacific* upheld the principle that arbitration of a claim under *New York Dock* should be invoked in a timely manner, stating that

"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 * * * . After all, in order for the mechanism of the grievance and arbitration process to operate, a claim must be filed." *Id.*

In sum, contrary to Claimant's contentions, *Union Pacific* supports application of laches in this case.

Claimant also relies on *UTU v. Delaware & Hudson Railway*, Pub. L. Bd. No. 382, Award No. 14 (Zumas 1974) (Claimant's Exh. 8), but the cursory analysis of laches there is not

dispositive in this case. In more recent cases, as BNSF demonstrated in its Petition (at 9-11), this Board and arbitration panels have applied laches to bar claims with a delay of less than a year, as well as claims -- similar to the one in this case -- with delays of more than two years. See *Grand Trunk Western R.R.*, Finance Docket No. 28676, 1996 STB LEXIS 55, at *12 (as corrected Mar. 14, 1996); *In re Arbitration between Southern Ry. and IBB* (Muessig 1990) (Attachment 6 to BNSF's Petition); *In re Arbitration between TCU and Norfolk & Western Ry.*, slip op. at 4 (LaRocco 1990) (Attachment 7 to BNSF's Petition) ("*TCU*").

Moreover, BNSF suffered actual prejudice as a result of Claimant's unreasonable delay. Claimant suggests, by reference to BNSF's current document retention policy, that she is not responsible for BNSF's difficulty in locating and presenting documents and witnesses that would qualify as "concrete evidence." See Claimant's Reply at 13 and Claimant's Exh. 7. BNSF's current document retention policy has no bearing on the fact that "[w]ith the passage of time," facts surrounding an employment dispute "become harder to prove as memories fade and witnesses become unavailable." *NLRB v. McCready & Sons, Inc.*, 482 F.2d 872, 875 (6th Cir. 1973). In this case, although most of the paper records were intact, those documents did not ultimately shed light on key issues such as the real decision-making authority and day-to-day responsibility for personnel decisions that Claimant exercised in her position. As a result, BNSF undeniably suffered prejudice as a result of Claimant's two year and seven months delay because it was unable to present live testimony on these issues.

In sum, Claimant did not satisfy her duty to pursue her claim in a reasonable amount of time, see *TCU* at 4, and BNSF has suffered actual prejudice as a result of this delay.

Accordingly, laches bars this claim.

CONCLUSION

For the foregoing reasons, BNSF respectfully requests that this Board grant BNSF's
Petition and review and set aside the Award to Ms. Suchy.

Respectfully Submitted,



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