

FROM : HEYWOOD AND CARI

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JUL 03 2002 05:15PM P2

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July 3, 2002

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

RE: Finance Docket No. 32549 *Sub 24*
The Burlington Northern and Santa Fe Railway Company v. Diane Suchy

Dear Mr. Williams:

Enclosed for filing in the above referenced proceeding, please find an original and ten (10) copies of Claimant's Objection to and Request for Denial of the Carrier's Motion for Leave to File a Reply to Claimant's Reply, and attachment thereto. Also enclosed is a diskette containing a copy of claimant's objection and request for denial thereof.

By copy of this letter deposited in the U.S. mail this date, I am serving a copy of the aforementioned objection on Carrier's counsel Lisa M. Harrison and Charles W. Shewmake.

If you should have any questions concerning the same or require anything in addition thereto, please do not hesitate to contact me. Thank you for your respectful consideration of our objection.

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

Walter Hodynsky
WH/dlc

Enc.

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

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**

**CLAIMANT'S OBJECTION TO AND REQUEST OF DENIAL OF CARRIER'S
MOTION FOR LEAVE TO FILE A REPLY TO CLAIMANT'S REPLY, AND
ATTACHMENT THERETO**

Walter Hodynsky
HEYWOOD & CARI, S.C.
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(715) 386-5551

Dated: July 3, 2002

Attorney for Claimant Diane Suchy

CLAIMANT'S OBJECTION

The basis for claimant's objection to and request for denial of Carrier's Motion for Leave to File a Reply to Claimant's Reply and the attachment thereto is summarized as follows:

1. No authority for the request is provided in Part §1115. of the Appellate Procedures of the Code of Federal Regulations.
2. The filing of the attachment to Carrier's motion is premature and inappropriate as the motion has not been granted by the Surface Transportation Board.
3. No valid basis for Carrier's motion is presented.
4. Carrier's premature reply presents nothing new from its original Petition for Review of Arbitration Award.

Claimant will now proceed to address each of the foregoing points briefly, and in so doing reiterates in the strongest terms possible, her objection to Carrier's Motion for Leave to File Reply to Claimant's Reply and attachment thereto and requests the same be denied outright.

I. CARRIER'S MOTION FOR LEAVE TO FILE REPLY TO CLAIMANT'S REPLY AND ATTACHMENT THERETO, IS VOID OF ANY AUTHORITY CITED IN SUPPORT THEREOF.

In neither the body of the Carrier's motion nor its premature attachment thereto, the actual reply to claimant's reply to Carrier's petition, does the Carrier cite any authority for the Board to grant leave to file a reply to claimant's reply in this case. As the Board is well aware, the Carrier brought its original Petition for Review of Arbitrator Ver Ploeg's Award under 49 C.F.R. §1115.8. Review of that section, however, provides absolutely no basis for any reply to claimant's reply to its original petition for review of the arbitration award. Indeed, further review of Part §1115, Appellate Procedures, Chapter 49 of the Code of Federal Regulations, does not

provide any rule or statutory support for such an extraordinary request. In fact, under §1115.2 respecting initial decisions, it is clearly spelled out in sub-section (4)(e) that "appeals must be filed within 20 days after the service date of the decision or within any further period (not to exceed 20 days) the Board may authorize. Replies must be filed within 20 days of the day the appeal is filed." Nothing whatsoever is provided therein with respect to a reply to the reply. This holds true for the remaining provisions of Part §1115. It must be assumed, therefore, absent any specific authority in the Federal Regulations or by statute, the Carrier's request is wholly without basis and at best, discretionary with the Surface Transportation Board. For this and the reason which follow, claimant respectfully submits that the Board should not exercise any such discretion and should deny Carrier's motion.

II. CARRIER'S FILING ITS ATTACHMENT TO ITS MOTION FOR LEAVE TO FILE A REPLY TO CLAIMANT'S REPLY IS CLEARLY PREMATURE.

Rather than providing a brief in support of its motion for leave to file a reply to claimant's reply, Carrier has taken the extraordinary liberty of attaching "Carrier's Reply to Claimant's Reply," without first securing the leave requested from the Surface Transportation Board to do so. This is clearly a kin to attempting to "shut the chicken coop door after the fox has already entered." In fact, without first securing leave of the Board to do what it requests to do, the Carrier has already done it! Certainly there is no better example of placing the cart before the horse. Perhaps, however, this represents the erroneous manner in which the Carrier practices before the Board. In this writer's experience, however, concerning bringing motions for leave to file a brief or to amend pleadings or to open discovery that which is sought to be approved is not actually done until the respective judicial or administrative body of whom the request is made has

granted the authority to do so. Indeed, this rather cavalierly presumes that the Board will automatically grant Carrier's Motion for Leave to File a Reply to Claimant's Reply. If it does not, as it should not in this case, the actual filing of the reply presented in the attachment to the Carrier's motion is clearly premature and inappropriate. As such, for this reason and in addition, due to the Carrier failing to cite any authority for its motion, much less to successfully argue on its behalf, leave to do so should be denied by the Board.

III NO VALID BASIS IS PRESENTED FOR CARRIER'S MOTION FOR LEAVE TO FILE REPLY TO CLAIMANT'S REPLY.

Apparently, the only basis for Carrier's motion is found in the following language in the text of its motion:

"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."

Apparently, then, the first purported basis for Carrier's motion is the allegation of "importance of the issues raised in Carrier's for Review of Arbitration Award." Well, it will have to be presumed that unless there were some important issues for the Board to review, in the Petition for Review of the Arbitration Award, the Carrier would not have appealed the Arbitrator's Award. As such, this statement appears self-evident and no less self-serving. However, it does not provide any independent basis for requesting the Board to grant the Carrier's extraordinary Motion for Leave to File a Reply to Claimant's Reply. No doubt this is the exception, rather than the rule. And, for the exception to be invoked, the Carrier must present a reason or several reasons for the Board to do so. The fact, that there may be issues raised for the Board to consider in the Carrier's Petition for Review of the Arbitration Award, does not

present an independent and valid ground for granting the Carrier's Motion for Leave to File a Reply to Claimant's Reply to said Petition.

Next, the second purported reason cited by the Carrier in support of its motion is allegedly "numerous misstatements of law and fact in Claimant's Reply." Carrier's motion while making such a bald allegation, fails to provide one single solitary example of any purported misstatement of either law or fact in support of that allegation. What then, is the Carrier actually alleging here? Obviously, the motion standing alone, does not provide any support therefore. And, without waiving the claimant's objection to the Board considering the Carrier's Reply to Claimant's Reply, the same being premature without the Board actually granting leave for the Carrier to do so, the text of said reply provides no assistance either. Nowhere in the reply does the Carrier set out even one example, much less "numerous misstatements of law and fact." Rather, the Carrier apparently confuses the same with the Claimant's arguments made in support of its position. This is apparent in the second paragraph of page 1 of its reply, where the Carrier maintains that "Among other inaccuracies in Claimant's Reply, Claimant contends" and then the Carrier proceeds to cite three of the claimant's contentions. The same, however, are neither "inaccuracies" nor are they "misstatements of law and fact" - rather they are more accurately described as Claimant's arguments against Carrier's Petition for Review of Arbitration Award. At the bottom of page 2, the Carrier apparently recognizes the same, by "calling a spade a spade." Stating in her reply, Claimant's argument that this two year statute of limitations does not bar her claim fails entirely." (emphasis added) Said argument, however, to repeat, is not a misstatement of law or fact.

Indeed, it is interesting to note that the unsupported charge leveled by the Carrier against

the Claimant in seeking leave from the Board to file a Reply to Claimant's Reply, it is clearly guilty of. This is only one of several of the Carrier's misstatements of law or fact found in its Reply:

1. At page 2 of its Reply, Carrier maintains that "Claimant's response in her Reply (at 7), [SIC] essentially that there should be no standards for assessing the timeliness of the claims in these situations." A review, however, of the Claimant's Reply at page 7, does not show anywhere therein that the Claimant is maintaining "there should be no standards for assessing the timeliness of claims in these situations." Rather, what the Claimant stated is that there are no time limits specified for bringing such claims either in the approval of merger in question or, and more specifically, in the New York Dock Employee Protective Conditions.

2. At page 4 of its Reply, Carrier maintains that it is undisputed the "claimant did not file a sufficient complaint for benefits under New York Dock for over two and one-half years."

Arbitrator Ver Ploeg, however, in her decision specifically held:

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

Thus, Arbitrator Ver Ploeg found that the claim had been timely filed. Her concern, however, addressed in the paragraph which follows in the Award, it is not with the timeliness of the filing of the claim, but with the purported delay in progressing the claim.

"it remains disturbing that Ms. Suchy did not further press this claim until 1998."

3. In footnote number 1 at the bottom of page 4 of its reply, Carrier references Director of

Labor Relations Wendell Bell's letter of September 18, 1996 and attempts to rather curtly dismiss the same by stating "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." This clearly is not the case. Mr. Bell is not therein referring to payable as presented provision such as found in Rule 34, but is responding to an argument made by claimant's counsel in another case with respect to the New York Dock claim being payable as presented because the Carrier failed to decline the same. See Claimant's Exhibit No. 1, attached hereto. Consequently, Mr. Bell's statement, as the Carrier is well aware, that there are no time limits in those Conditions and certainly, no "payable as presented 'remedy' for an alleged breach of such non-existence time limits" applies strictly to the New York Dock Employee Protective Conditions and not to any collective bargaining agreement provisions.

4. At page 6 of its reply, after claimant pointed out that any lack of the Carrier's ability to produce documents needed for its case was due to Carrier's violation of its own document retention policy, the Carrier now states "In this case, although most of the paper records were intact, those documents did not ultimately shed light on the key issues such as real decision-making authority and day-to-day responsibility for personnel decisions that Claimant exercised in her position." However, this was not the position previously espoused in its Petition for Review of the Arbitration Award as well as in its original brief to the arbitrator. With respect to the former, at page 11, the Carrier stated "Ms. Suchy's two and one-half year delay in filing a claim for arbitration obviously hampered BNSF's

ability to locate and present documents and witnesses that would qualify as concrete evidence." With respect to the latter, at page 29 of its original brief, Carrier stated:

"Many of the documents which discussed their position, job duties, etc. at that time no longer exists. Moreover, witnesses have left the employ of the company and factual discovery years after the fact is speculative at best and impossible at worst."

As such, the "chameleon like" position expressed now by the Carrier is directly opposite to that which it had previously held. Therefore, rather than the claimant being guilty of "numerous misstatements of law and fact", it is the Carrier who has taken liberty with its words and in so doing has clearly done on "about face", misconstruing the plain language of the text in such a manner that it seeks to conveniently explain away. However, the Board should not let it do so.

IV. CARRIER'S REPLY TO CLAIMANT'S REPLY PRESENTS NOTHING NEW.

Aside from the foregoing reasons which clearly weight against the Board granting Carrier's Motion for Leave to File a Reply to Claimant's Reply, it is clear that the reply it would file presents nothing new. Indeed, in each argument sub-sections, the Carrier points out "As BNSF demonstrated in its Petition (at 5-6); As BNSF showed in its Petition (at 6-9); and As BNSF showed in its Petition (at 9-11)" nothing new is presented, but only re-argument of its previous position. In addition thereto, Carrier simply makes its previous argument using the previous awards cited in its Petition for Review of the Arbitrator's Award. Indeed, it appears that the Carrier only wishes to have the last word in the matter. As such, there would be nothing gained by the Board allowing Carrier's Reply to Claimant's Reply in this case. Consequently, for this reason as well, Carrier's Motion for Leave to File a Reply to Claimant's Reply should be

denied.

CONCLUSION

Claimant respectfully requests the Board, after considering Carrier's motion, to deny the same for the reasons discussed above:

1. The Carrier has presented no statutory or federal rule regulation in support thereof;
2. Its filing a reply as an attachment to its motion for leave before actually securing leave from the Board to do so was premature, inappropriate and rather presumptive on its part as to how it assumed the Board would rule;
3. Carrier has presented no valid basis in support of its motion; and
4. It's purported reply is a restatement of its previous position and also attempts to misstate not only things previously argued on its behalf, but which were presented in the Claimant's Reply to Carrier's Petition for Review of Arbitration Award.

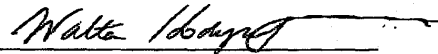
Therefore, for all of these reasons, Claimant respectfully urges the Board to deny and concurrently to dismiss Carrier's Motion for Leave to File a Reply to Claimant's Reply and the attachment thereto. In the alternative, and without waiving its position, Claimant requests that she be able to reply to Carrier's reply should the Board grant Carrier's Motion for Leave to File a Reply to Claimant's Reply.

FROM : HEYWOOD AND CARI

FAX NO. : 715 386 5531

Jul. 03 2002 05:20PM P12

Respectfully submitted,



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

Dated: July 3, 2002

FROM : HEYWOOD AND CARI

FAX NO. : 715 386 5531

Jul. 03 2002 05:21PM P13

CLAIMANT'S EXHIBIT

1. **Attorney Hodynsky's letter of July 9, 1996 to Carrier's then Vice President Labor of Relations**

FROM : HEYWOOD AND CARI

FAX NO. : 715 386 5531

Jul. 03 2002 05:21PM P14

July 9, 1996

Mr. James B. Dagnon
Executive Vice President
Employee Relations
3000 Continental Plaza
777 Main Street
P.O. Box 961030
Fort Worth, TX 76161-0030

CERTIFIED
RETURN RECEIPT REQUESTED

RE: New York Dock Employee Protective Conditions

Dear Mr. Dagnon:

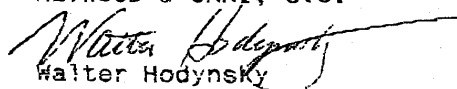
This refers to our letter of May 22, 1996 on behalf of our client Sharen Olek presenting claim on her behalf for benefits under New York Dock Employee Protective Conditions to which she is entitled to as a result of the abolishment of her BN exempt position on or about December 31, 1995 following the Burlington Northern (BN)-Atchison, Topeka and Santa Fe (AT & SF) Railway Merger. A copy of said letter is enclosed for your ready reference.

In reviewing our file, I do not find the courtesy of your reply to date. Since, however, this claim has not been denied within the 20 days provided in Section 11 of the New York Dock Employee Protective Conditions, I ask that you advise when Ms. Olek will start receiving her displacement allowance and other benefits claimed therein. And, should you maintain that you have declined the same this is to advise non-receipt of any such letter of declination since our letter of May 22, 1996 was mailed.

Thus, your prompt attention to this matter will be appreciated.

Very truly yours,

HEYWOOD & CARI, S.C.


Walter Hodynsky

WH:kp

Enclosure

cc: Sharen Olek

FROM : HEYWOOD AND CARL

FAX NO. : 715 386 5531

Jul. 03 2002 05:14PM P1



FAX COVER SHEET

FAX

HEYWOOD & CARL, S.C.

1200 Hosford St., Suite 106, P.O. Box 125

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DATE:	7-3-02
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