

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25121
Docket Number MW-25091

Martin F. Scheinman, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(**Escanaba** and Lake Superior Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it laid off Messrs. **J. Vermulen, J. Walling, J. Helgren, M. Wilcoxon, J. Foucault** and **J. Benson** on December 9, 1980 without benefit of five (5) days' advance notice (System File ELS-1678).

(2) President John **Larkin** failed to disallow the claim (appealed to him under date of May 2, 1981 as contractually stipulated within Rule **52(a)**).

(3) As a **consequence** of either or both (1) and/or (2) above, the claimants shall

"each be allowed pay at their respective **straight-time** rate of pay for forty (40) hours account five day notice not afforded these employees when their positions were abolished on December 9, 1980".

OPINION OF BOARD: The relevant facts of this claim are not in dispute. In December 1980, Claimants were employees of Carrier holding seniority in their respective classes within the Track Sub-Department. They were regularly assigned to a rail gang working in the Upper Peninsula of Michigan. On December 9, 1980, Carrier notified Claimants that they were laid off at the end of their regular work period on that date.

The Organization contends that Carrier should have given Claimants five (5) working days' advance notice of force reduction in accordance with Rule **9(b)** of the Agreement. That rule reads:

"Not less than five working days' advance notice will be given to regularly assigned **employees**, not including casual employees **or** employees who are substituting for regularly assigned employees, who are subject to the rules of the existing collective agreement whose positions are to be abolished before such reductions in force are **made**."

The Organization maintains that Claimants were regularly assigned employees. They are not casual employees; nor were they substituting for regularly assigned employees. Thus, the Organization reasons that Claimants were entitled to five days' advance notice when they were laid off in December 1980. Accordingly, it asks that the claim be sustained.

Carrier, on the other hand, denies that it violated the Agreement. First, Carrier points out that the Organization did not file an appeal to this **Board until** some two years after the Organization appealed Carrier's original denial of the instant claim. In Carrier's view, this delay constitutes **laches**. Thus, Carrier reasons that the claim should be dismissed on this ground alone.

Second, Carrier asserts that the claim was not filed until March 8, 1981, more than sixty days after the date of the alleged violation, December 9, 1980. Therefore, Carrier concludes that the claim should be rejected because it was not filed in a timely manner.

As to the merits, Carrier maintains that Claimants were verbally notified that their jobs would be abolished with the first snowfall. Accordingly, Carrier suggests that it complied with Rule **9(f)** in that Claimants had advance notice that they would be laid off. Accordingly, Carrier contends that the claim should **be denied** on its merits as well as on procedural grounds.

A review of **the** record evidence convinces us that the claim must be sustained. This is so for a number of reasons.

First, we note that Carrier did not respond to the Organization's appeal of Carrier's denial of the claim in May 1981. **Under these** circumstances, the Organization cannot be found guilty of **laches**. The delay in the Organization's appeal to this Board was caused in part, by Carrier's failure to respond to the Organization's prior appeal. Thus, we reject Carrier's contention that the claim should be rejected on the basis of **laches**.

As to Carrier's other arguments, we note that the record evidence reveals that Carrier failed to raise these issues on the property. That failure bars this Board from considering these arguments. **Had** they been raised on the property, they might have constituted valid defenses against the Organization's claim. However, they cannot be considered here. Thus, we are compelled to sustain the Organization's claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the **Agreement** was violated.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT **BOARD**
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.