Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33417
Docket No. MW-32317
99-3-95-3-155

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Western Maryland
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned B&O employe W. F. Gaither to perform equipment operator's work (operate a tamper) on the Georges Creek Subdivision on July 13 and 14, 1992, instead of assigning one of its qualified, furloughed employes, Mr. J. E. Hall, to perform said work (WMR).

(2) The Carrier violated the Agreement when it assigned B&O employe C. Lipscomb to perform equipment mechanic's duties (repair engine to Tamper # TST-527) on the Georges Creek Subdivision on July 15, 16 and 17, 1992, instead of assigning one of its qualified, furloughed employes, Mr. G. Harbaugh, to perform said work.

(3) The Carrier violated the Agreement when it assigned B&O employes S. Kimble and B. Duckworth to perform equipment operator's work (operate a ballast regulator and tamper) on the Lurgan Subdivision at Hagerstown, Maryland on August 19 and 20, 1992, instead of assigning qualified furloughed employes G. Harbaugh and R. L. Ridenour to perform said work.

(4) The Carrier violated the Agreement when it assigned B&O employe P. Parker to perform trackman and truck driving duties at Hagerstown, Maryland on August 17 and 18, 1992, instead of assigning furloughed employe G. Harbaugh to perform said work.

(5) The Carrier violated the Agreement when it assigned B&O employe P. Parker to perform trackman and truck driving duties at Hagerstown, Maryland on August 24, 25, 26, 27, 28, September 1 and 2, 1992, instead of assigning furloughed employe G. Harbaugh to perform said work.

(6) The claims referenced in Parts (1) and/or (2) above, as presented by Vice Chairman R. L. Caldwell on September 9, 1992 to Division Engineer M. D. Ramsey, by Certified Mail # P 940 722 273, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16 (a).

(7) The claim referenced in Part (3) above, as presented by Vice Chairman R. L. Caldwell on September 17, 1992 to Division Engineer M. D. Ramsey, by Certified Mail # P 940 722 270, shall be allowed as presented because said claim was not disallowed by him in accordance with Rule 16 (a).

(8) The claims referenced in Parts (4) and/or (5) above, as presented by Vice Chairman R. L. Caldwell on October 20, 1992 to Division Engineer M. D. Ramsey, by Certified Mail # P 134 140 814, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16 (a).

(9) As a consequence of the violations referred to in Parts (1) and/or (6) above, Claimant J. E. Hall shall be compensated for sixteen (16) hours' pay at the Class 'A' Operator's rate.

(10) As a consequence of the violations referred to in Parts (2) and/or (6) above, Claimant G. Harbaugh shall be compensated for twenty-nine (29) hours' pay at the work equipment mechanic's time and one-half rate.

(11) As a consequence of the violations referred to in Parts (3) and/or (7) above, Claimants G. Harbaugh and R. L. Ridenour shall each be compensated for twenty-four (24) hours' pay at the Class 'A' Operator's time and one-half rate.

(12) As a consequence of the violations referred to in Parts (4) and/or (8) above, Claimant G. Harbaugh shall be compensated for sixteen (16) hours' pay at the Class 'A' Operator's rate.

(13) As a consequence of the violations referred to in Parts (5) and/or (8) above, Claimant G. Harbaugh shall be compensated for fifty-six (56) hours' pay at the Class 'A' Operator's rate."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The issue before the Board involves five claims submitted under the dates of September 9, 17 and October 20, 1992. All of the claims involved allegations that the Carrier permitted employees foreign to the Agreement to perform Scope protected work. However, the merits of these claims were not addressed on the property. What stands squarely before the Board is a procedural dispute.

The facts are agreed upon. The Organization submitted each of these claims within the time frames of the Agreement and to the proper first level claims officer. It argued on the property that as each was sent certified mail and went unanswered, the Carrier was in default and each claim must be allowed as presented.

Although the claims were submitted under different dates in 1992, they were formally listed for a claims conference held on November 17, 1994. At that conference, the Carrier argued that each claim was properly denied at the first level. It presented the Organization with a letter denying each claim. The Carrier thereafter made two

arguments that stand properly before the Board. It argued that because the Organization failed to timely appeal the Carrier's denial, it was procedurally barred from doing so and secondly, that the claims are barred under the doctrine of laches.

Each of the parties to this dispute has come to the Board arguing a clear cut case of procedural violation. The Carrier argues that when the Organization alleged a failure of the Carrier to respond to the claims at the first level, it had an obligation to assert its rights immediately and not wait two years. The Carrier maintains that each denial went unanswered and attempts to revive the claims in 1994 are untimely. The Organization argues that the denial letters presented at the claims conference were never seen prior to November 17, 1994. During handling on the property, it requested any "verifiable, third party proof that the claims in fact [had] been answered timely." It denied that any of the claims had ever been answered.

The Board read and seriously considered all Awards presented by the parties. The Carrier's reliance is upon Awards that have held that when a Carrier later submits a copy of an alleged response sent by regular U. S. Mail, it is presumed to have been timely received, if properly dated and addressed (Third Division Award 18891; First Division Award 24490; Public Law Board No. 1605, Award 43). The Organization points to Awards holding that when the addressee argues that it did not receive denial by U. S. Mail, the burden shifts to the sender to prove it was received (Third Division Awards 31394, 31395, 31508, 31759). In particular, the parties dispute the relevance of Third Division Award 31208 with the Organization's Concurring and Dissenting Opinion, which was a dispute between these same parties and which found a time limit violation.

The facts at bar convince the Board that time limit violations occurred. The Organization filed a certified letter with the Carrier. The Carrier's presentation of letters of denial do not prove that they were timely written, mailed or received. This is particularly true in this record where after the Organization directly challenged the Carrier to prove that its "self-serving documentation" was timely sent, no persuasive evidence was presented. We focused carefully on the last days of this dispute on the property in which the Organization alleged on February 21, 1995 of Carrier's "self-serving" showing of letters of declination without further proof; the Organization's March 27, 1995 letter requesting allowance of the claims; the Organization's April 4, 1995 Notice of Intent sent four days subsequent to the Carrier's receipt of the March 27, 1995 letter; the Carrier's response of April 26, 1995; the attached January 10, 1995

letter from the Administrative Clerk indicating no knowledge of a timeliness issue with Carrier's denials sent to her office. We gave appropriate consideration to all the material to assure that the Carrier was not ambushed in a last minute attempt to avoid proper argument.

The Board is persuaded that disputes revolving around time limits are central to the progression of claims and must be resolved by the proof of record. The Organization's proof of claims sent to the Carrier by certified mail is uncontested. The burden shifted to the Carrier to prove that the declination letters were properly received (Third Division Awards 28504, 25309). Even if arguendo, the Board were to assign proper weight to the Administrative Clerk's letter with no rebuttal from the Organization, it would not suffice to persuade the Board that the local Carrier officer at the first level sent the letters (Third Division Awards 31394, 25309). A letter from the Division Engineer at the first level is not a part of the record. A letter sent by the Carrier with any form of follow-up proof of receipt is not in this record. We must find that absent persuasive proof we are left with untimely responses by the Carrier. We find no Agreement provision with language allowing us to hold that the Organization failed to timely progress. We also find that these claims are not barred under the doctrine of laches. Although laches includes undue and unexplained delay, the party asserting the doctrine of laches must demonstrate that the delay was inexcusable, unreasonable and prejudicial. Although the Carrier invokes the doctrine of laches, it failed to present any evidence to support its position. Accordingly, the claims are sustained as presented.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 1999.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 33417; DOCKET NO. MW-32317
(Referee Marty E. Zusman)

We like to think that more often than not, in the final analysis the majority of the Board's Awards are logical and make sense, whether the Carrier wins or whether the Carrier loses. This Award is one of those rare exceptions to that rule.

By concluding that the claims were not responded to by the Carrier as provided for in the parties' Time Limit on Claims Rule, i.e., Rule 16, the Majority ignored the facts of record established on the property and turned a "blind eye" to core principles of the Board.

The Organization alleged that the original claims were not timely declined and the Majority mistakenly agreed. During the on-property handling, this argument was confronted and the Organization was presented copies of the declination letters in conference as evidence substantiating the fact that the claims were timely declined.

The Majority's neglect of this and other evidence and its acceptance of the Organization's illogical approach to the claims handling process does severe harm to the established principles of the Board relative to resolution of minor disputes; hence, this Award is PALPABLY ERRONEOUS and has no precedential value.

A review of the record reveals that Vice Chairman, Secretary-Treasurer Randy L. Caldwell submitted five separate claims to Division Engineer M. D. Ramsey via Certified Mail (two dated September 9, 1992; one dated September 17, 1992; and two dated October 20, 1992.) It was not until November 7, 1994, i.e., more than two years later that General Chairman Jed Dodd informed Manager Employee Relations B. Claud Sweatt that the Organization had ". . . a number of claims for which we have no response from the first level claim officer." In Attachment "A" to such letter the General Chairman listed 16 claims, the oldest of which were the five claims presented to the Board in Docket MW-32317.

In Manager Employee Relations Sweatt's January 4, 1995 response he confirmed that the five claims had been timely denied by Division Engineer Ramsey in 1992 and memorialized the fact that during the parties' November 17, 1994 conference discussion of the alleged time limit default, Engineering Department Administrative Clerk Melody Stabler, a TCU represented clerical employee, furnished the General Chairman with copies of the Division Engineer's five responses that were addressed to Mr. Randy L. Caldwell, Vice Chairman, 1584 Principio Furnace Road, Perryville, Maryland, 21903.

The Manager Employee Relations denied the Organization's appeal on the basis the claims were inappropriately submitted to the second level of the claims handling process because the Organization failed to timely appeal the subject matters to the second level officer. In addition, the Manager Employee Relations denied the untimely appeal on the basis the claims were barred under the doctrine of laches.

As the Majority noted at Page 4 of the Award, the Organization thereafter demanded ". . . verifiable, third party proof that the claims in fact [had] been answered timely." General Chairman Dodd insisted that the Carrier had ". . . the burden to produce a postal receipt or some other non self-serving documentation that the claims had in fact been responded to in a timely manner." This notwithstanding the fact that he acknowledged that his filing system was ". . . set up to open when there is a response from management" and conceded that such procedure was ". . . not a very efficient system and this experience has caused some reform in our filing systems." As prescribed by Rule 16, the Division Engineer mailed his declination letters to Mr. Caldwell's address, because he was the Organization representative who submitted the claims. It was Mr. Caldwell's responsibility to either forward the Division Engineer's declination letters to General Chairman Dodd so he could "open" his file system, or to timely notify General Chairman Dodd that he did not receive responses from the Division Engineer at the same time he notified the Division Engineer that he had not received responses to his claims. There is no evidence in the record that Mr. Caldwell did either.

At Page 5 of the Award the Majority states:

> "A letter from the Division Engineer at the first level is not a part of the record."

We are puzzled by this pronouncement because Division Engineer Ramsey's five declination letters (two dated November 11, 1992; one dated November 18, 1992, and two dated December 16, 1992) not only appear in the record as Attachment Nos. 1 - 5 of the Organization's Exhibit A-9, but also as CSX Exhibit "C," Pages 1 - 5.

In the very next sentence the Majority states:

> "A letter sent by the Carrier with any form of follow-up proof of receipt is not in this record."

Prior Board Awards have correctly stated the principle that in instances such as this the Carrier is charged with the responsibility of establishing that it mailed its declination letter(s) within the prescribed time limit, not that the Organization received the declination letter(s). Just because the Organization elected to submit the claims via Certified Mail and the Carrier elected to respond via regular U. S. Mail the Majority seems to be saying that no matter what proof the Carrier submits short of a Certified Mail Return Receipt is insufficient. This "logic" is preposterous!

First of all, the parties' Time Limit on Claims Rule does not require the parties to use Certified Mail. Secondly, as noted by the Majority, Administrative Clerk Melody Stabler, a disinterested third party TCU represented clerical employee with nothing to gain or lose, submitted a written statement into the record, which reads as follows:

> "Reference to your correspondence to General Chairman J. Dodd of the BMWE dated January 4, 1995 concerning claims which he contended were not responded to locally.
>
> Be advised that during our recent claims conference of November 17, 1994 with General Chairman Dodd and Local Chairman Harbaugh, claims discussed were handled in a timely manner which were originally sent to this office, and we were not aware of a timeliness issue until this item was presented prior to the claims conference."

Administrative Clerk Stabler's January 10, 1995 statement, which was addressed to Manager Employee Relations Sweatt, was attached to AVP Employee Relations R. H. Cockerham's April 26, 1995 letter addressed to General Chairman Dodd in response to his nine letters dated March 27, 1995 (received March 31, 1995) relative to the instant claims and others. For reasons known only to the Organization, neither Cockerham's letter nor Stabler's statement was included as an exhibit to its Submission. Giving the Organization the benefit of the doubt, we can only assume that the reason it did not include this critical correspondence in its submission to the Board was its ill-conceived interpretation that the on-property record was closed when it promptly submitted its April 4, 1995 Notice of Intent to file an ex parte Submission with the Board.

Even more disturbing is the Majority's statement at Page 5 of the Award that:

> "We find no Agreement provision with language allowing us to hold that the Organization failed to timely progress."

Not surprisingly, Rule 16, as set forth on Page 6 of the Organization's Submission, reads, in relevant part, as follows:

> "(a) 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 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

In order to find Paragraph (b) of Rule 16 one must look to either Page 6 of the Carrier's Submission, or its Exhibit "A." Rule 16 (b) reads, in relevant part, as follows:

> "(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances." (Emphasis added)

Can it be that the Majority did not see the afore-quoted Agreement provision because it mistakenly relied on the Organization to place the entire Rule in evidence before the Board? There can be no mistake but that Vice Chairman, Secretary-Treasurer Caldwell was obligated to inform Division Engineer Ramsey within 60 days of the date he should have received his responses that he had not received same. In spite of the fact that such procedure has been historically followed in this industry since at least 1954, no such notification appears in the record before the Board. Again, it was not until November 7, 1994, i.e., more than two years later that not the Vice Chairman, Secretary-Treasurer, but the General Chairman FINALLY informed not the Division Engineer, but the Manager Employee Relations that ". . . we have a number of claims for which we have no response from the first level claim officer."

Furthermore, common sense dictates that while a single declination letter properly addressed to the Vice Chairman, Secretary-Treasurer may be lost in the regular U. S. Mail, it is inconceivable that five separate declination letters (two dated November 11, 1992; one dated November 18, 1992; and two dated December 16, 1992) all could be lost by the U. S. Postal Service.

From the perspective of a "Monday morning quarterback" it would appear that given the Majority's illogical conclusion, which effectively writes 75% of the parties' Time Limit On Claims Rule out of their Agreement, in the future the Division Engineer's office staff would be well advised to destroy any of the Division Engineer's claim files for which he does not timely receive a letter of rejection from the Claimant or his representative. By so doing, the Carrier could thereby preserve its doctrine of laches argument, for it could then undoubtedly prove that the Organization's "... delay was inexcusable, unreasonable and prejudicial."

For the foregoing reasons we strenuously dissent to this PALPABLY ERRONEOUS Award.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

July 13, 1999