

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33568

Docket No. MW-32463

99-3-95-3-373

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen 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 Assistant Track Inspector S. J. Pierce to perform foreman and assistant foreman's work (secure track for Maintenance of Way work equipment) in the yard at Hagerstown, Maryland beginning August 1 through 18, 1992, instead of assigning furloughed employe J. E. Hall to perform said work.

(2) The Carrier violated the Agreement when it assigned Assistant Track Inspector S. J. Pierce to perform foreman and assistant foreman's work (secure track for Maintenance of Way work equipment) in the yard at Hagerstown, Maryland beginning August 24 through September 18, 1992, instead of assigning furloughed employe J. E. Hall to perform said work.

(3) The claims referenced in Parts (1) and (2) above, as presented by Vice Chairman R. L. Caldwell on October 20, 1992 to Division Engineer M. D. Ramsey, shall be allowed as presented because said claims were not disallowed by Division Engineer M. D. Ramsey in accordance with Rule 16(a).

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, furloughed employe J. E. Hall shall be allowed one hundred forty-four (144) hours, pay at the foreman's rate.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, furloughed employee J. E. Hall shall be allowed one hundred fifty-two (152) hours pay at the foreman'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.

By letter dated October 20, 1992, Vice-Chairman Caldwell filed two claims on behalf of J. E. Hall, alleging a violation of his Agreement rights when the Carrier utilized Assistant Track Inspector Shields to perform certain work on various dates in August and September 1992. The Organization avers that the original claims were sent via the U.S. Postal Service, as certified mail with return receipt requested. According to the Carrier, Division Engineer M. D. Ramsey denied the first claim on grounds of alleged untimely filing and the second claim on the merits and because the Claimant was not furloughed but working on those claim dates, both denials being in the form of letters to Vice-Chairman Caldwell, dated December 16, 1992, and sent by the U.S. Postal Service ordinary first class mail.

The crux of the case as it is presented to the Board is the Organization's assertion that the Carrier violated the time limits of Article 16 (a), infra, in that the denial letters of December 16, 1992 allegedly were never received by the Organization [the BMWE posits that they likely were never mailed]. However, the Carrier presents two counter arguments: 1) the letters were mailed and 2) arguendo, even if they were not received, the claims are barred by Article 16 (b), infra, and/or laches because the Organization took no action on these files until almost two years later when the General Chairman listed several such claims for discussion at a November 17, 1994 claims conference:

"In addition we have a number of claims for which we have no response from the first level claim officer. These claims are also being appealed to you as a default issue and for discussion at our November 17, 1994 conference. The unanswered claims are listed on Attachment A to this letter. Attached to Attachment A are copies of the original claims filed."

During the claims conference on November 17, 1994 the Carrier representatives produced copies of the December 16, 1992 denial letters referenced, *supra*, and by letter of January 4, 1995 took the position that "the claims in question were inappropriately submitted to this level of the claims handling process and that the claims in question are procedurally defective, inasmuch as no appeal of the subject matter was made or attempted to be made." Thereafter, by letter March 27, 1995 the General Chairman appealed the claims to the highest designated officer and eight days later filed a Notice of Intent with the Board. The Carrier issued its final denial of the claims by letter dated April 26, 1995.

We do not reach the merits of these claims and neither express nor imply any opinion thereon because the matter as presented is joined solely on the issue of laches and the language of Rule 16 Time Limits on Claims, which reads in pertinent part as follows:

"Rule 16. 1. All claims or grievances arising on or after January 1, 1955 shall be handled 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 representatives) 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.**

(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 is to other similar claims or grievances...."

If, arguendo, the denial letters of December 16, 1992 were not received within the 60-day time limit mandated by Rule 16, the Organization inexplicably waited nearly two additional years before taking any action at all to pursue its claim that the Carrier had violated Rule 16(a). We have been made aware of Third Division Awards 25493 and 33320, but find that those Awards are confined to their unique facts, which are readily distinguishable from the facts in the record now before us. Nor do we take exception to the authoritative precedent emanating from Third Division Award 25309, culminating most recently in Award 33452. But that case also is factually distinguishable because it presented no issue of undue delay or laches.

After weighing and balancing the countervailing arguments in light of the unique facts of this record, we conclude that Article 16 (b) does not defeat the Organization's claim of Article 16 (a) violation. However, we are not persuaded to follow the lead of Third Division Award 33417 because we differ fundamentally with its conclusion concerning application of the doctrine of laches to the facts presented. In our considered judgement, contrary to the reasoning expressed in that decision, the undue and unexplained two year hiatus between the Organization's knowledge of an alleged time limit violation and its protest thereof does constitute unreasonable, unjustified and prejudicial delay which bars progression of the claim under the doctrine of laches. Thus, this particular claim is barred by the doctrine of laches. See Special Board of Adjustment No. 570, Award 288; Public Law Board No. 1312, Award 156; First Division Award 20650; Second Division Award 6980 and Third Division Award 10020.

AWARD

Claim dismissed.

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ORDER

**This Board, after consideration of the dispute identified above, hereby orders that
an Award favorable to the Claimant(s) not be made.**

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

Dated at Chicago, Illinois, this 20th day of October 1999.