

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33623
Docket No. MW-32363
99-3-95-3-210**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin 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 outside forces (H. Jeffries Contracting Company) to pave the Long Meadow road crossing at Hagerstown, Maryland on August 21 and 22, 1992 (WMR).**
- (2) The claim as presented by Vice Chairman Secretary-Treasurer R. L. Caldwell on September 17, 1992 to Division Engineer M. D. Ramsey shall be allowed as presented because said claim was not timely disallowed by Division Engineer M. D. Ramsey in accordance with Rule 16.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed employes T. L. Lynch, R. L. Smith, G. A. Harbaugh, H. D. Weslow and R. L. Ridenour shall each be allowed thirty-four and one-half (34.5) hours' pay at their respective time and one-half rates and they shall each receive the appropriate credits for vacation and railroad retirement purposes.”**

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 September 17, 1992, sent Certified Mail, the Organization filed the claim that is at issue in the instant proceeding. On November 7, 1994, the Organization requested a conference concerning a number of claims, including some for which it had allegedly not received responses from the first level claim officer. The Organization appealed those claims as a default issue. At a conference held on November 17, 1994, the Carrier provided the Organization with a purported copy of a November 18, 1992 letter declining the claim.

The parties agree that the merits of the claim are not before the Board. The Organization maintains that it did not receive the first level claim denial until the November 17, 1994 conference. Consequently, the Carrier failed to respond to the claim within 60 days of its filing and, under Rule 16(a) the claim must be allowed as presented. The Carrier contends that it sent the denial in a timely fashion and that the Organization failed to respond within the 60 days allowed under Rule 16(b). The Carrier urges that the Agreement does not require it to reply via Certified Mail.

The identical issue was presented to the Board in Third Division Awards 33417 and 33452. Both Awards interpreted Rule 16(a), which provides:

"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."

Both Awards recognized that the Agreement does not require the Carrier to respond to claims via Certified Mail. However, both Awards recognized that when the Organization files a claim via Certified Mail, the Organization invites the Carrier to respond by the same medium and the Carrier chooses to use a different medium at its peril. Both Awards hold that under such circumstances, the Carrier's subsequent assertion that the denial letter was sent and received in a timely manner, coupled with a file copy of the purported denial letter, is insufficient to establish that the Carrier replied in a timely fashion.

In keeping with the principle of stare decisis and to ensure stability in the relationship between the parties, we should follow prior Awards unless they are palpably wrong. We cannot say that Awards 32417 and 32452 are palpably wrong. We hold that they control the instant case.

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 16th day of November 1999.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 33623; DOCKET MW-32363
(Referee Martin H. Malin)**

The underlying issues and arguments contained in the record before the Board in this case are essentially identical to those contained in the records before the Board in Dockets MW-32317 and MW-32523 that resulted in Third Division Award 33417 (Referee Marty E. Zusman) and Third Division Award 33452 (Referee Margo R. Newman) which were adopted on July 13 and August 23, 1999, respectively. For the sake of brevity, our Dissents to those Awards are incorporated herein by reference.

However, two additional comments are necessary. First, Referee Malin's decision completely ignored the Carrier's laches defense for no apparent reason. Second, on or about September 13, 1999 the Board received Referee Dana Edward Eischen's proposed decision in Docket MW-32463 that overturned the prior Awards and ruled in the Carrier's favor. Because the Labor Member was on vacation, the Carrier Members did not move that decision for adoption at the September 22, 1999 adoption session. Instead, it was bypassed and ultimately adopted on October 20, 1999 as Third Division Award 33568. Likewise, the underlying issues and arguments contained in the record before the Board in Referee Eischen's case are essentially identical to those contained in the record before the Board in Referee Malin's case. Docket MW-32363 was argued before Referee Malin on May 18, his proposed decision was received by the Board on October 1, and it was adopted on November 16, 1999.

Because Referee Eischen's well reasoned proposed decision was not expeditiously adopted and available for transmittal to Referee Malin before he sent his proposed findings to Arbitration Assistant Linda A. Woods we will never know whether his decision would have been different had he been able to compare and contrast the logic set forth in the three decisions cited above. Indeed, Referee Malin, being unaware of the existence of Referee Eischen's contrary decision, concluded:

"In keeping with the principle of stare decisis and to ensure stability in the relationship between the parties, we should follow prior Awards unless they are palpably wrong. We cannot say that Awards 32417 and 32452 are palpably wrong. We hold that they control the instant case."

Consequently, we strenuously dissent to this Award which, in our view, IS PALPABLY ERRONEOUS.


Michael C. Lesnik


Martin W. Fingerhut


Paul V. Varga

December 23, 1999

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 33623, DOCKET MW-32363
(Referee Malin)

According to the Carrier Members' Dissent, the fact that Referee Eischen accepted the Carrier's laches argument presumes that every other award rendered on this subject should fall in lock step behind his findings. The problem with this thinking is that a review of Award 33568, rendered by Referee Eischen, when compared with the findings of Award 33417, rendered by Referee Zusman, reveals that those two (2) Neutrals differ as to the application of the doctrine of laches. It is the opinion of this advocate that the findings rendered by Referee Zusman are the proper application of the doctrine of laches. Clearly, Referee Zusman considered the Carrier's argument concerning the doctrine of laches when he stated:

“**** 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.”

A review of the above-cited award reveals that Referee Zusman did consider the Carrier's laches argument and dismissed it because the Carrier could not show that the Organization's delay in appealing a claim that was already in default was inexcusable, unreasonable or prejudicial. Referee Eischen on the other hand merely disagrees with Referee Zusman's application of the doctrine of laches, but he does not show that Referee Zusman's findings were in palpable error. It has been said that reasonable men may find themselves in disagreement over an issue, but such does not equate to an error in either man's reasoning. This is exactly what we have in these two (2) disputes.

Referee Malin read the Zusman Award, including his analysis of the Carrier's laches argument, and concluded that his reasoning was not in palpable error. For the Carrier Members to allege that Referee Malin failed to consider the Carrier's laches argument is erroneous.

The Carrier Members' Dissent implies that the Carrier's laches argument was unique only to the dockets assigned to Referees Zusman, Eischen and Malin. The fact of the matter is that there were eight (8) cases filed at the NRAB concerning nearly identical issues. In each and every case, the Carrier argued that the claims should be dismissed based on the doctrine of laches. Those cases were assigned to Referees Zusman, Newman, Eischen, Malin and Benn. The Organization's position was that the Carrier failed to disallow the initial claims in accordance with Rule 16(a). The Carrier's argument was that it did deny the claims and since the Organization failed to appeal the claims, they

should be denied. Moreover, as the Carrier contended, the doctrine of laches prevails and the claims should be dismissed. Since Referee Zusman held that the Carrier failed to prove that it denied the claims in accordance with Rule 16(a), the claims should be sustained. Insofar as the Carrier's argument concerning the doctrine of laches is concerned, he analyzed the Carrier's laches argument in Award 33417 and found said argument unpersuasive. Hence, it was not necessary for Referees Newman and Malin to make any comment concerning that argument because neither of them considered it to be in palpable error. As I stated earlier, Referee Eischen merely disagreed with Referee Zusman and applied the doctrine of laches to the award he denied. Now there are three (3) awards that have considered the Carrier's argument concerning the doctrine of laches and have found that argument insufficient to overcome the Carrier's initial failure to answer the claims in accordance with Rule 16(a).

Finally, comment must be made to the Carrier Members' statement concerning the processing of Referee Eischen's proposed award. Although that award may have been received by the Arbitration Assistant on September 13, 1999, it was not received in my office for review until September 20, 1999. At that time I was on vacation. However, prior to my departure for vacation, I received a list of dockets that were to be adopted at the September 22, 1999 adoption session. Inasmuch as both the Chairman and Vice Chairman of the Third Division were aware that I would not be in attendance, the list sent to me contained all of the proposed awards that would be adopted on September 22, 1999. The proposed award from Referee Eischen in Docket MW-32463 was not on the list of awards to be adopted on September 22, 1999 that was sent to me prior to my departure. When I returned from vacation on September 23, 1999, I was made aware of the proposed award from Referee Eischen. Moreover, I was made aware that the Carrier Members attempted to move that docket for adoption at the September 22, 1999 adoption session. During the September 22, 1999 adoption session, the Third Division Vice Chairman asked the Carrier Member if I had been made aware of Referee Eischen's proposed award and approved it for adoption. The Carrier Member stated that I had not approved the proposed award for adoption and thus it was not adopted on September 22, 1999. Had Vice Chairman Miller not inquired if I had been made aware of Referee Eischen's proposed award, it would have been adopted without my knowledge.

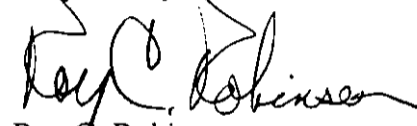
Clearly, the Carrier Members' Dissent to Award 33623 (Malin) implies that something sinister was afoot because Referee Eischen's proposed award was not adopted at the September 22, 1999 adoption session. Nothing could be further from the truth insofar as the handling by the Brotherhood of Maintenance of Way is concerned regarding Referee Eischen's proposed award. Sadly, the same cannot be said about the Carrier Member's handling of Referee Eischen's proposed award. Clearly, the Carrier Members were attempting to move Referee Eischen's proposed award through the adoption session without my knowledge. If anything sinister was afoot, that was it. The record is clear that I was simply unaware of Referee Eischen's proposed award prior to me leaving for vacation. Hence, in keeping with the time honored protocol of the Third Division, Referee

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Eischen's proposed award was not adopted until I was made aware of the proposed award. Upon my return from vacation on September 23, 1999, I was made aware of Referee Eischen's proposed award and it was promptly adopted at the next scheduled adoption session. For the Carrier Members to imply anything to the contrary is deceptive.

Referee Malin's findings in Award 33623 are correct and stand along with Awards 33417 (Zusman) and 33452 (Newman) as binding precedent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with the first name "Roy" being more prominent.

Roy C. Robinson
Labor Member