Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34195
Docket No. MW-32515
00-3-95-3-416

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it recalled junior employe T. L. Lynch to fill a trackman's position at McCool, Maryland beginning August 9, 1993, instead of recalling senior employe R. S. Palmer (WMR).

(2) The claim referenced in Part (1) above as presented by Vice Chairman R. L. Caldwell on September 10, 1993 to Division Engineer M. D. Ramsey shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. S. Palmer shall be allowed one hundred sixty-eight (168) hours' pay at the trackman's rate and he shall receive proper credit 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 10, 1993 sent by certified mail, the Organization filed a claim on the Claimant's behalf seeking 168 hours pay for August 9-13, 16-20, 23-27, 30-31, September 1-3 and 6, 1993, alleging that a junior employee was recalled to a Trackman's position over the Claimant, a furloughed employee.

During the processing of the dispute on the property, the Carrier produced an unsigned letter from the Carrier's Division Engineer dated November 7, 1993, declining the claim on the merits and asserting that August dates presented in the claim were previously filed in another claim "and therefore one of these claims should be withdrawn. . . ." The Carrier further stated in that letter that the Claimant remained in a furloughed status on September 1, 2, 3, 6, 1993 and the junior employee was on duty and under pay.

By letter dated November 7, 1994, the Organization listed claims for a conference on November 17, 1994 and further stated "[i]n addition we have a number of claims for which we have no response from the first level claim officer" and that "[t]hese claims are also being appealed to you as a default issue and for discussion at our November 17, 1994 conference." This claim was listed as part of those allegedly unanswered claims.

A claims conference was then held on November 17, 1994.

By letter dated January 4, 1995, the Carrier reiterated its position from the November 17, 1994 conference that the claims the Organization contended were not responded to were, in fact, denied at the local level. The Carrier stated further that copies of the previously issued denials were given to the Organization at the conference. The Carrier then reiterated its position that, given the Carrier's timely denials, further processing of the claims by the Organization was untimely. The Carrier also asserted laches as a defense.

In a letter dated January 10, 1995, Administrative Clerk Melody Stabler states:

"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."

By letter dated February 21, 1995, the Organization restated its position that the Carrier's asserted initial denial was not received by the Organization until a copy of the letter was given to the Organization at the November 17, 1994 claims conference. In response to the Carrier's assertion that the Organization did not timely appeal the declination, the Organization responded that because the claim was not denied, it was not required to do so.

By letter dated March 27, 1995, the Organization again contended that the Carrier failed to timely deny the claim and that the claim should be allowed as presented.

By letter dated April 26, 1995, the Carrier again asserted its position that the Organization was untimely in its further progression of the claim after the initial denial.

In brief, then, the record discloses that the Organization filed a claim by certified mail on September 10, 1993; at a November 17, 1994 claims conference, the Organization asserted that it never received a denial of the claim from the Carrier; and, at that conference, the Carrier produced a copy of an unsigned letter dated November 7, 1993 from the Division Engineer denying the claim.

Rule 16 states:

"TIME LIMIT ON CLAIMS.

Effective January 1, 1955

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 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.

(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. . . ."

The parties' disagreements discussed at the November 17, 1994 claims conference over whether the Carrier timely responded to the Organization's claims has spawned a number of Awards from the Board. Aside from this Award and the Awards issued this date in Third Division Awards 34196, 34197 and 34198 with this sitting neutral, see Third Division Awards 33417, 33452, 33568 and 33623 decided with four other neutrals.

In Award 33417 (Carrier Members strongly dissenting), the Board found that the Carrier did not timely respond to the claims and that the copies of the letters of denial presented at the November 17, 1994 claims conference were insufficient to establish that the Carrier, in fact, made timely denials:

"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.

* * *

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 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."

In Award 33452 (Carrier Members again dissenting), the Board also sustained the Organization's position that the Carrier failed to timely respond:

"The record in this case reveals that Carrier did not sustain its burden of proving that the declination letter herein was actually sent to, or received by, the Organization. Producing a file copy of an undated, unsigned letter is insufficient evidence to prove that it was actually timely sent. See Third Division Awards 25100, 25309. While it is true that Carrier is not required by Rule 16 to use certified mail, when it chose not to do so in this case, it ran the risk of nonreceipt and was unable to rebut the Organization's assertion that the declination letter was never received. See Third Division Award 21373. Accordingly, the clear language of Rule 16 requires that the claim be "allowed as presented."

After considering Awards 33417 and 33452, Award 33623 followed in step deferring to those Awards:

> "Both Awards [33427 and 33452] 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."

Awards 33417, 33452 and 33623 have established what appears to be a virtual steam roller requiring sustaining this claim. At this point, the relative merits of the parties' arguments are secondary. These three prior Awards considered the same facts and arguments arising out of the infamous November 17, 1994 claims conference and agreed with the Organization's assertions that the Carrier did not demonstrate timely denials of the claims therefore requiring under Rule 16.1(a) that the claims "shall be allowed as presented." The only question here is whether those Awards — particularly Awards 33417 and 33452 which addressed the timeliness issues on the merits — are palpably in error. We considered the Carrier Members' strong dissents to Awards 33417 and 33452 and find them logical and compelling. However, for us to now rule differently on the similar set of facts arising out of the same circumstances would be an invitation to chaos encouraging both sides when faced with an adverse decision to contest a similar future dispute and to shop for another neutral to hopefully come up with a different result.

At best, Awards 33417 and 33452 are debatable. However, as found in Award 33623, they are not palpably wrong. Those prior Awards are based upon reasonable interpretations of the relevant factual showings, language of the Agreement and prior established authority. Indeed, we carefully considered the Carrier's assertions that the claims were timely denied. However, we cannot say that the conclusions of Awards 33417 and 33452 were palpably wrong that the evidence was insufficient to show timely denials by the Carrier. Of particular note is Administrative Clerk Stabler's letter of

January 10, 1995 set forth above which was produced by the Carrier after the November 17, 1994 claims conference. It is not palpably wrong to conclude that the conclusionary statement "claims discussed were handled in a timely manner which were originally sent to this office" does not rise to the level of necessary proof to show that the denial letters relied upon by the Carrier were sent to the Organization in a timely manner, i.e., that on a date certain within the time frame set forth in Rule 16.1(a) ("within 60 days from the date [the claim] is filed") each denial letter was composed by its author and mailed in the ordinary course to the Organization. Perhaps that conclusion is debatable. But it is not palpably in error to conclude that the proof offered by the Carrier was insufficient to rebut the Organization's assertion that there were no timely responses to the claims discussed in Awards 33417 and 33452.

The focus of this dispute then must return to the process. The Organization previously prevailed on this dispute in three separate prior Awards from three separate neutrals. Irrespective of how this sitting neutral feels, for the purpose of stability and the preservation of the process, because those prior Awards are not palpably wrong, those prior Awards must be followed.

But then there is Award 33568, authored by an eminent neutral, which denied the same claim. That Award did not focus its attention on the Carrier's alleged failure to timely respond to the initial claim. Indeed, that Award agreed with the reasoning concerning the discussion of whether the Carrier demonstrated that it responded in a timely fashion. However, Award 33568 ruled favorably on the Carrier's laches argument:

> "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 Awards 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 judgment, 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."

Just focusing upon the laches argument, the problem with Award 33568 is that the result is precisely what must be avoided when prior disputes — indeed, as here, the same disputes — are decided by prior Awards of the Board. The neutral in Award 33568 disagreed with the laches rationale of the neutral in Award 33417 ("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"). That reasoning is precisely the invitation to chaos that must be avoided and goes against the cornerstone of the long standing doctrine that prior Awards between the parties must be followed unless palpably in error. Award 33417's laches rationale ("Although laches includes undue and unexplained delay, the party asserting the doctrine of laches must demonstrate that the delay was inexcusable, unreasonable and prejudicial [and a]lthough the carrier invokes the doctrine of laches, it failed to present any evidence to support its position") is, at best, debatable. Award 33417's rationale — which included the discussion of laches — was also followed in Award 33623 with the finding that "[w]e cannot say that Award . . . 33417 [is] . . . palpably wrong." Given this particular dispute stemming from the November 17, 1994 claims conference, Award 33417 (as also followed in Awards 33452 and 33623) is the law of the case. For those reasons and for the purpose of stability (and irrespective of how this sitting neutral might decide the same dispute if presented on a de novo basis), Award 33417 simply must be followed.

One final matter remains — the remedy. The function of a remedy is to make whole those employees who have been adversely affected by a contract violation. Remedies are not to be windfalls. This record discloses the Carrier's position that part of this claim involving the August 1993 dates may also have been part of another claim filed on the Claimant's behalf. The Claimant cannot be paid twice for the same dates. The parties are directed to determine whether the Claimant will receive double payment for the August dates set forth in this claim. If so, the Claimant shall not be entitled to double compensation for those dates. In terms of the remedy, the Claimant shall therefore be made whole.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of August, 2000.