

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 1
**Claim of V. P. Juarez
Basic Day for Working
Conductor-Only**

THE UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim for a basic day on behalf of Conductor V. P. Juarez account required to work conductor-only on the Seligman Subdivision Short Pool on January 10, 1998. And claim on behalf of the brakeman standing for service.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on July 2, 2004, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

On January 9, 1998, Claimant was called to work at 1540 hours to operate the P-PHXCHI1-09 out of Ash Fork to Winslow, Arizona, which he operated conductor-only. Article 2, Section 1, of the 1992 Crew Consist Agreement states that "Conductor-only service may be established on through freight trains between terminals . . ." (Org. Ex. 2). Article 21 of the Coast Lines UTU Agreement for Roadmen (Org. Ex. 3) states, in pertinent part, as follows:

It is not the intention to cut out crews between terminals, but it is recognized that the exigencies of the service will sometimes require this; notably at such points as Ash Fork and Williams. It is understood that conditions may arise at other points similar to those now existing at those above mentioned. Crews so cut out if not regularly assigned, shall stand first out with respect to crews similarly cut out, if held eight hours from time tied up, will be paid at one-eighth of the daily rate applicable to last service performed for each hour held after eight hours with a maximum of eight hours' payment and similarly for each succeeding twenty-hour period. . . .

Claimant filed a claim for a basic day because he was required

to work conductor-only. The Carrier declined the claim as without merit; the Organization appealed the denial and, as the claim was not resolved on the property, it was presented to this Board for resolution.

POSITIONS OF THE PARTIES: **The Organization** argues that Claimant is entitled to a basic day's pay because Article 2 of the governing Agreement permits the Carrier to establish conductor-only service only on through freight trains between terminals and that Ash Fork is not a terminal. It contends that, since 1943, the Carrier has differentiated between what is a terminal and a cut-out point and that Ash Fork has always been referred to as a cut-out point and never been referred to as a terminal.

As to the Carrier's point that the claim is without merit under the equitable doctrine of laches, the Organization contends that it has not "sat on its rights" with respect to this issue and the doctrine of laches does not apply. It contends that a series of events and circumstances - including the merger between the Carriers and the need to replace the long-time Union office secretary who became mentally handicapped and needed to be replaced - resulted in a delay in processing the claim, but that, by letter dated April 11, 1996 (Org. Ex. 13), both Parties agreed to an indefinite extension for formal appeal letters. It contends that, since the letter provided no time limit and that it refers to "an indefinite extension," the doctrine of laches does not apply. The Organization maintains that, as soon as the current General Chairman took office in February 2003, it promised to process the cases and that this is the first opportunity it has had to rectify this issue. In addition, citing authority, it argues that a defense, such as laches, must be raised during discussions of the claim on the property and maintains that the Carrier failed to do so.

The Organization argues that the Carrier's action violated the Agreement and urges that the claim be sustained.

The Carrier argues that the claim is barred from consideration on its merit because the Organization procrastinated unacceptably in the progression of the claim. It asserts that the equitable doctrine of laches applies. It notes that the claim is from January 1998 - six years before it was listed to arbitration. It contends that such a delay is indefensible, in view of the fact that the former General Chairman initially stated that the claim represented a flagrant violation of the Agreement worthy of "major dispute" status, and that the Parties agreed to "expedited" arbitration.

The Carrier asserts that the Parties met several times concerning the claim between January 1998 and March 2001 and that the former General Chairman was placed on notice that this dispute was growing stale. It contends that he was advised, in clear and unambiguous terms, that if he continued to resist moving this dispute to resolution, the Carrier would argue the equitable doctrine of laches. It maintains that the former General Chairman continued to refuse to progress the claim, refusing one formal conference in 2001 and canceling another in 2002, and then, knowing he was retiring in 2003, refused to formally conference any claim or resolve any dispute. The Carrier argues that, despite the improved efforts to clean up the backlog of cases, including the instant case, under the current General Chairman, this case was not progressed under the doctrine of laches. It points out, in addition, that a Public Law Board was established in late 1999 and the Organization, under the former General Chairman, chose not to list the instant case to that Board, further indicating its intent to abandon the claim.

As to the Organization's point that the April 1996 letter indicates an agreement between the Parties granting an indefinite extension for formal appeal letters, the Carrier argues that the Organization had an obligation to progress the instant dispute in a reasonable manner. It contends that, although the letter gave the Organization some time limit relief at the time of the merger, it was not intended to allow abandonment of its responsibility under the Railway Labor Act to progress and dispose of disputes. Citing authority it further maintains that an extension of time limits does not relieve the Organization of its obligation to comply with the provisions of the Railway Labor Act.

As to the merits, the Carrier argues that Ash Fork is a recognized terminal under the Coast Lines Agreement and, therefore, that the claim is without merit. It points out that Ash Fork is recognized under the core Agreement as a tie-up point and has all the elements and qualities of an away-from-home terminal and that, under the 1992 Crew Consist Agreement, the train may be operated in the freight pool between terminals in order to become a conductor-only train. It maintains that the train is operated between two terminals, Winslow and Phoenix.

Finally, the Carrier argues that the Organization failed to carry the requisite burden of proof and failed to identify any rule or provision specifically supporting its position.

The Carrier urges that the claim be dismissed under the equitable doctrine of laches or denied as without merit.

DISCUSSION AND ANALYSIS: Upon the whole of the record and following consideration of the arguments of the Parties, the Board is persuaded that the case must be dismissed based upon the equitable doctrine of laches. The Award so reflects.

The doctrine of laches generally provides the party asserting it with an equitable defense where there has been an undue lapse of time by the other party in enforcing a right to action and these long-neglected rights are then sought to be enforced. The doctrine recognizes that, because of the delay, the party's ability to defend itself may be unfairly impaired because needed witnesses or evidence may have become unavailable or lost.

The Board is persuaded that, by its failure to pursue the instant claim for so many years, the Organization signaled to the Carrier that it had abandoned the claim. Some of the events referred to by the Organization to justify its delay in processing the claim - the office secretary's illness and the merger, as well as the April 1996 letter - occurred long before January 1998, the date involved in the instant claim. It is undisputed that a number of discussions between the Parties occurred between 1998 and 2001 and an arbitration board was established where other cases were heard. It is also undisputed that the former General Chairman was placed on notice that the Carrier believed this dispute was growing stale and that, if the dispute were not moved to resolution, it would argue the equitable doctrine of laches. Despite these warnings no formal conference was held until 2003 and the case was not listed for arbitration until 2004.

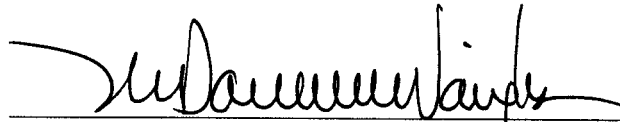
The Organization correctly points out that the letter of April 11, 1996, extending the time limits under the Agreement between the Parties, does not itself contain any time limit or expiration date. Nonetheless, the Organization was responsible under the Railway Labor Act to pursue its claims expeditiously. Its failure to process this claim within a reasonable period of time, separate and apart from any specific time limits imposed by the Agreement, must be construed by the Board as abandonment by the Organization of its claim.

In that the case is dismissed based on the doctrine of laches, this Board does not reach the merits of the dispute.


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AWARD: The Organization failed to pursue its claim expeditiously.
The claim is dismissed.

Dated this 21st day of August, 2004.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member