AWARD NO. 14
CASE NO. 14

PUBLIC LAW BOARD NO. 5902

PARTIES)	**UNITED TRANSPORTATION UNION-YARDMASTERS DEPT.**
TO)	
DISPUTE)	**NORFOLK SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM:

> Claim on behalf of Harrisburg Division Yardmaster R. C. Kratz for penalty claims from split date (June 1, 1999) until January 5, 2000. (File AM-ABR-00-1)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon. The Claimant was present for the Board's hearing on this case.

The Board finds that it is not able to reach out to the merits of the dispute at issue in a finding that the Carrier violated the relevant time limit on claims rule (Rule 18) in a failure to show by probative evidence that it had timely denied the claim.

Rule 18(A) of the Controlling Agreement reads:

> 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 calendar 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 calendar days from the date same is filed, notify the employee or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

The claim was filed on July 30, 1999, retroactive to June 1, 1999. The latter is the date that the Carrier acquired a portion of Conrail that included the Claimant's work zone, and which gave rise to the claim that the Carrier violated the controlling Agreement in an alleged failure to have assumed supervision of West Falls Yard by a Carrier Yardmaster as opposed to the use of a Shared Asset Area (SAA) (Carrier/Conrail) Yardmaster. In part, the claim as submitted to the District Superintendent on July 30, 1999 reads:

> As per the filings dealing with the Conrail acquisition, West Falls Yard became part of the NS system. Prior to the June 1st Split Date, West Falls Yard had been controlled by Conrail Yardmasters located at Midvale Yard. Since June 1st, as you are aware, NS and CRC Management have agreed to continue having Midvale SAA Yardmasters control West Falls Yard, including switching, blocking, classifying and handling of cars in NS trains by yard, local or freight NS crews.
>
> * * * * * *
>
> Therefore, the above is a violation of our contract/implementing agreement with the NS. I am claiming one day's pay at time and one-half from June 1, 1999 (Split Date) until resolution of this matter for not being offered work at West Falls. I have personally spoken with Labor Relations and Div. Mgr. on this issue and, to date, the situation has not been rectified. (Emphasis Added by the Board.)

There is no question that the Carrier had 60 calendar days within which to act upon the claim. Although the Carrier insists that the claim was denied within the time constraints of Rule 18, the only documentation that the Carrier offers in support of its contention is a facsimile copy of an undated memorandum addressed to the Claimant from the District Superintendent in denial of the claim that the Carrier says was received in its Labor Relations office on August 19, 1999. The Carrier argues that receipt of copy of the memorandum in its Labor Relations office evidences that the District Superintendent had timely released the memorandum in denial of the claim to the Claimant on that date, August 19, 1999. The Claimant denies having been in receipt of the memorandum.

The Board is not persuaded by Carrier argument. Moreover, the memorandum at issue lists copy of the denial as going to three other Carrier officials in addition to an official in the Labor Relations Department. The record as presented does not show that copies of the memorandum had in fact been received by fax or otherwise in these. This leads the Board to question whether it was but a draft copy of the memorandum that was faxed to the Labor Relations office since the copy as introduced is, as stated above, undated.

Argument that the claim should be sustained by reason of the time element has merit. The extent to which it is requested that the claim be sustained is not, however, sound. In this respect, it concerns the Board that the Claimant would first wait some 60 days to file and back date the claim to June 1, 1999, albeit we recognize that such retroactive dating has been held to be permissible in application of Rule 18 for claims of a continuing nature.

Clearly, the Claimant was aware before July 30, 1999 as to the manner in which the West Falls Yard was being supervised or operated. This is evidenced by the third sentence in

the first paragraph and the last sentence of the last paragraph in the rather lengthy, full-page, claim as submitted to the Carrier.

It concerns the Board that after filing the claim, and allegedly not receiving a response within the proscribed 60-day time period, or what we calculate to have been on or before September 28, 1999, that the Claimant would thereafter wait until January 3, 2000, to notify the District Superintendent that he had not received a reply to his claim of July 30, 1999 in violation of the time limit on claims rule. It would seem that the Claimant only took this action at that time in the knowledge that the Carrier was posting notice that effective January 5, 2000 that the operation of West Falls Yard was to be controlled by a Carrier Yardmaster stationed at Abrams Yard, an action that would put an end to the continuing claim.

Although Rule 18 is silent with respect to when argument must be advanced relative to a violation of time limits, certainly a rule of reason called for the Claimant to have communicated his purportedly not having received any information about the claim in a timely manner. We do not believe that the rule may be read as having intended that a Claimant may sit idly by and wait some indeterminate or unreasonable period of time to place the Carrier on notice that it had failed to comply with the applicable procedural time limits so as to accumulate a windfall settlement. See, for example, the following excerpt from First Division Award 20650:

> The grievance procedure has many different functions in the day-to-day operations of an industrial enterprise. An important function is to settle grievances or claims (so-called minor disputes) expeditiously and speedily to insure smooth and uninterrupted operations. Time is usually of the essence so that the grievances or claims do not drag on until evidence has been lost, memories have faded, and witnesses have disappeared. Recognizing this fact, Congress expressly stated in Section 2 of the Railway Labor Act that one of the general purposes of the Act is "to provide for the prompt ... settlement of all disputes growing out of grievances ..." In addition, Congress prescribed in Second 2, Second of the Act that all disputes between a carrier and its employees "shall be considered and, if possible, decided with all expedition." Thus, Congress clearly expressed the intent to promote settlements of minor disputes without undue delay. To permit grievances or claims to slumber for an unreasonable or unduly prolonged time would not only deprive the grievance procedure of its vitality but would also run counter to Congressional intent. <u>It follows that a claimant who fails for an unreasonable period of time to act upon rights of which he has full knowledge may be barred from further processing them under the generally accepted doctrine of acquiescence.</u> See: Frank Elkouri and Edna A. Elkouri, **How Arbitration Works** ... <u>Acquiescence arises where a person who knows that he is entitled to enforce a right neglects to do so</u>

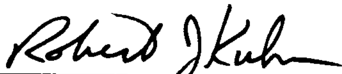
> for such a length of time that, under the facts and circumstances of the case at hand, the other party may fairly infer that he has waived or abandoned his right. See: **Black's Law Dictionary**, ... and cases cited therein. In such instance, the absence of a contractual or statutory time limit, as is here the case, is immaterial. (Emphasis Added by the Board.)

In view of the particular and unique circumstances found to exist in this case, the Board will direct that the liability period for the claim be June 1, 1999 to October 13, 1999. As concerns the latter date, October 13, 1999, that is the date 15 days beyond the date that it is presumed that Claimant was aware that the Carrier had failed to timely deny the claim. Further, in keeping with the common law rule on damages, compensation awarded is to be offset by earnings that the Claimant received during the period of time for which the claim is sustained.

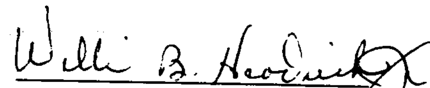
AWARD:

Claim sustained to the extent set forth in the above Findings.

Robert E. Peterson
Chair & Neutral Member



Robert J. Kuhn
Carrier Member



William B. Headrick, Jr.
Organization Member

Norfolk, VA
Dated July 16, 2001