Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7021
SECOND DIVISION Docket No. 6897
2-MP-SMW-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(A.F.L. - C.I.O.
(
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated the controlling Agreement, particularly rule and Article 1(g) and Article III, Sections (i) and (j), Article I(g) of the Vacation Agreement of August 21, 1954 and May 12, 1972, when they refused Sheet Metal Worker W. T. Hooten vacation for 1973.

2. That accordingly the Missouri Pacific Railroad Company be ordered to compensate Sheet Metal Worker W. T. Hooten one hundred twenty (120) hours at the punitive rate of pay for the year of 1973.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The specific areas of violation charged against Carrier by Petitioner are detailed in the Statement of Claim, as is the compensatory relief demanded. The basic issue asserted by Petitioner is that "Carrier improperly refused vacation accruing to Claimant for the year 1973 as per controlling Agreement".

The pertinent facts are that Claimant entered Carrier's service as an apprentice in 1956 and attained journeyman status in 1961. In 1963 Claimant entered military service until August, 1972, when he returned to work for Carrier. During 1972, after his return from service, he performed work for Carrier for 99 days. Petitioner originally claimed that Claimant had worked 144 days in 1972, but this was amended in its submission to 100 days, as Claimant "believes". The instant claim was initially filed on February 25, 1974.

Carrier disputes the claim on the merits, but contends firstly that the claim is barred from consideration since it was not timely filed within the sixty day period specified in Rule 31(a) of the controlling Agreement. It appears from the record that Claimant and Petitioner were advised by Carrier in October, 1972 (when vacation request forms were being passed out) that no vacation would be granted Claimant for 1973. Accordingly, Carrier maintains, the instant claim was required to be filed within 60 days from October, 1972.

Petitioner replies that Claimant "continued to protest" until the end of 1973, hoping Carrier "would realize its error" and grant the vacation or pay for it by the end of 1973, that being the year in which the said vacation was required to be allowed, if at all. Hence, that the claim filed on February 25, 1974 was within the required 60 days from December 31, 1973.

There is no question but that Carrier properly raised the issue as to "timely filing" at various stages of the processing of this claim on the property. Additionally, it is not disputed that the vacation schedule for 1973 was posted in October or November, 1972, which did not include Claimant's name. Nor is it disputed that in October of 1972, when request vacation forms for 1973 were distributed, Claimant was not given such form. At this point the Local Chairman "verbally protested this decision to Mr. Daniel who informed me that no vacation for Mr. Hooten in 1973 was due and would not be granted." This was a clear and unequivocal statement by Carrier denying Claimant any vacation or, in plain inference, any vacation rights. Obviously, in view of such positive statement by Carrier, Claimant and Petitioner knew at that time that Claimant would not be allowed any vacation for 1973 or any payment in lieu thereof.

Rule 31(a) of the Agreement is precise. It requires that such claims must be presented "within 60 days from the date of the occurrence on which the claim or grievance is based." That "occurrence", on the record evidence before us, took place in October and November, 1972, when Claimant and Petitioner knew beyond peradventure that no vacation would be allowed him for 1973. Hence, the filing of the claim on February 25, 1974, was clearly not within the required 60 day period.

In this connection, we have held repeatedly that the Agreement must be construed as written and that precise time limits are mandatory upon the parties and must be complied with. Prior Awards on this established principle are legion and need hardly be cited. Nor are any prior Awards of this Division or any other Division cited by Petitioner in support of its position on the point in issue.

Conversely, Award 4297 (Daly), decided on this property and under the same controlling Agreement and similar facts, fully supports the foregoing findings. In that case we held:

> "It cannot be logically or successfully argued that the Organization was within its rights in waiting to see if the Carrier paid the Claimant his alleged vacation entitlement during the year of 1960, because the Claimant and the Organization were aware of the Carrier's prior denial of this claim. Consequently, to allow the entire year of 1960 - plus an additional 79 days - to run its course before filing a written claim was an empty and fatuous gesture. Unquestionably, both Claimant and the Organization were guilty of laches."

The above findings and conclusion are particularly apropos to this dispute, Claimant and Petitioner having allowed the entire year of 1973 to elapse - plus an additional 56 days - before filing the written claim.

To the same effect, albeit on varying factual situations, see Second Division Awards 4783, 5018, 5307, 6296, 6622 and 6854.

In Award 6296 (Cole), we stated:

> "Certainly the possibility of injustice is not a defense to this limitation".

The following quote from Award 2480 (Schedler) is of further relevancy:

> ". . . Moreover, we do not see how a grievant can file a grievance until he knows or thinks he has been aggrieved. . . . We think the time limitation started to run at that point." (Emphasis added).

In the dispute before us, Claimant and Petitioner knew in October and November, 1972, that Claimant had been aggrieved. The time limitation "started to run at that point".

Accordingly, this claim not having been timely filed, is barred from consideration by this Board and must be denied.

Finally, in view of the foregoing findings we do not deem it necessary to enter into discussion of the merits or other issues raised in this dispute.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March, 1976.